ILE COPY

No. 542

Office Supreme Court, U.S.
FILED
NOV 23 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

GRACE LINE INC.,

Petitioner,

v.

FEDERAL MARITIME BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

LAWRENCE J. McKAY,
80 Pine Street,
New York 5, New York,
Attorney for Petitioner.

Of Counsel:
CAHILL, GORDON, REINDEL & OHL,
ARTHUR MERMIN,
RAYMOND L. FALLS, JR.

November 23, 1960

INDEX.

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
Grace Line's Contract Carriage of Bananas	7
The Proceedings Below	8
REASONS FOR GRANTING THE WRIT	11
I—The importance of the construction of the Shipping Act approved by the decision below and the clear error in that construction require review by this Court	11
The Impact of the Decision	11
The Majority Below Misconstrued the Language of the Shipping Act	14
The Majority Below Misconceived the Intent and Purpose of the Shipping Act	19
1. Legislative History	20
2. Reasoning of the Opinion Below	22
II—The decision of the Court of Appeals constitutes such a departure from the proper course of judicial proceedings on review of administrative action as to require review by this Court	24
The Majority's Reason for Deferring to the Board is Insupportable	25
The Court was Fully Competent to Weigh and Reject the Board's Decision	29
CONCLUSION	34

Table of Cases.

	PAGE
Baltimore Tank Lines v. *Public Service Commission*, 215 Md. 125, 137 A. 2d 187 (1957)	19
Bankers' Mutual Casualty Co. v. *M., S. P. & S. S. M. Ry.*, 117 Fed. 434 (8th Cir. 1902)	32
Central Railroad & Banking Co. v. *Lampley*, 76 Ala. 357 (1884)	32
Certain-teed Products Corp. v. *Chicago, Rock Island & Pacific Railway*, 68 I. C. C. 260 (1922)	18
Cleveland, C. C. & St. L. Ry. Co. v. *Henry*, 170 Ind. 94, 83 N. E. 710 (1908)	32
Cooperative Legislative Committee v. *Public Utilities Com'n*, 149 Ohio 511, 80 N. E. 2d 159 (1948)	19
Davies Warehouse Co. v. *Bowles*, 321 U. S. 144 (1944)	31
Dickson v. *Great Northern Railway*, 18 Q. B. D. 176 (C. A. 1886)	32, 33
East Texas Motor Freight Lines, Inc. v. *Frozen Food Express*, 351 U. S. 49 (1956)	30
Express Cases, 117 U. S. 1 (1885)	32, 33
Farmers and Mechanics Bank v. *Champlain Transp. Co.*, 16 Vt. 52 (1844)	32
Federal Maritime Board v. *Isbrandtsen Co.*, 356 U. S. 481 (1958)	34
Frost & Frost Trucking Co. v. *Railroad Commission of California*, 271 U. S. 583 (1926)	22
Galveston Chamber of Commerce v. *Saguenay Terminals*, 4 F. M. B., 375 (1954)	33
Grasselli Chemical Co. v. *Central Railway Co. of New Jersey*, 81 I. C. C. 562 (1923)	18
Honeyman v. *Oregon & C. R. Co.*, 13 Ore. 352, 10 Pac. 628 (1886)	32
Kansas City Southern Railway v. *United States*, 282 U. S. 760 (1931)	16

PAGE

Lake Shore & Michigan Southern R. R. v. *Perkins*, 25 Mich. 329 (1872) 32, 33

Lauritzen v. *Larsen*, 345 U. S. 571 (1953) 5, 6

Long v. *Lehigh Valley R. Co.*, 130 Fed. 870 (2d Cir. 1904) 32

Louisville N. A. & C. Ry. v. *Keefer*, 146 Ind. 21, 44 N. E. 796 (1896) 32

Manufacturers Railway Co. v. *St. Louis, Iron Mountain & Southern Railway*, 21 I. C. C. 304 (1911) 17

Matter of Agreements 6210, 2 U. S. M. C. 166 (1939) 31

Michigan Public Utilities Commission v. *Duke*, 266 U. S. 570 (1925) 22, 33

Mt. Tom Motor Lines v. *McKesson & Robbins, Inc.*, 325 Mass. 45, 89 N. E. 2d 3 (1949) 19

National Labor Relations Board v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956) 31

National Labor Relations Board v. *Highland Park Manufacturing Co.*, 341 U. S. 322 (1951) 30

New York Marine Co. v. *Buffalo Barge Towing Corp.*, 2 U. S. M. C. 216 (1939) 31

Northern Fur Co. v. *M., St. P. & S. S. M. Railway*, 224 F. 2d 181 (7th Cir. 1955), *cert. denied*, 350 U. S. 900 (1955) 17, 32

Northern Pacific Railway Co. v. *State of North Dakota*, 236 U. S. 585 (1915) 22

Pan Atlantic Steamship Corp.-Exemption, Section 303(e), 285 I. C. C. 752 (Div. 4, 1956) 13

Philip R. Consolo v. *Grace Line, Inc.*, 4 F. M. B. 293 (1953) 31, 32

Producers Transportation Co. v. *Railroad Commission of California*, 251 U. S. 228 (1920) 22

Puerto Rican Rates, 2 U. S. M. C. 117 (1939) 31

Roberts v. *Chicago, R. I. & P. R. Co.*, 99 F. Supp. 895 (D. Minn. 1951) 32

Russell v. *Pittsburgh C., C. & St. L. Ry. Co.*, 157 Ind. 305, 61 N. E. 678 (1901) 32

PAGE

Sea Train Lines Inc. v. *United States*, 152 F. Supp. 619 (D. Del. 1957), *aff'd*, 355 U. S. 181 (1957) 13
Securities and Exchange Commission v. *Chenery Corporation*, 318 U. S. 80 (1943), 332 U. S. 194 (1947), *rehearing denied*, 332 U. S. 783 (1947) 28
Smith v. *Cahoon*, 283 U. S. 553 (1931) 22
Social Security Board v. *Nierotko*, 327 U. S. 358 (1946) 30
Spanable v. *New York Cent. R. Co.*, 60 Ohio App. 50, 69 N. E. 2d 441 (Ct. App. Franklin Co. 1946) 32

Terminal Taxicab Co. v. *Kutz*, 241 U. S. 252 (1916) 18
Transportation by Mendez & Co., 2 U. S. M. C. 717 (1944) 31

United States v. *Contract Steel Carriers, Inc.*, 350 U. S. 409 (1956) 30
United States v. *Louisville & Nashville Railroad*, 221 F. 2d 698 (6th Cir. 1955) 16, 17, 32, 33
United States Navigation Co. v. *Cunard S. S. Co.*, 284 U. S. 474 (1932) 17

STATUTES.

Shipping Act of 1916:
Section 1, 46 U. S. C. §801 (1958) 3, 4
Section 14, 46 U. S. C. §812 (1958) 3, 5, 14, 19, 22, 23
Section 16, 46 U. S. C. §815 (1958) 3, 5, 15, 19, 22, 23

Interstate Commerce Act:
Section 1(1), 49 U. S. C. §1(1) 15
Section 1(4), 49 U. S. C. §1(4) 16
Part III, 49 U. S. C. §§901-23 (1958) 4, 13

Act of March 4, 1913, 37 Stat. 938 18

MISCELLANEOUS.

Davis, *Administrative Law Treatise* (1958 ed.) 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

GRACE LINE INC.,

Petitioner,

v.

FEDERAL MARITIME BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Grace Line Inc. prays that a writ of certiorari issue to review a judgment entered by the United States Court of Appeals for the Second Circuit on July 13, 1960.

This is a proceeding to review an order of the Federal Maritime Board.* The Court of Appeals denied Grace Line's petition for review and affirmed the Board's order, with Judge Moore dissenting.

Opinions Below.

This case has been before the Court of Appeals for the Second Circuit twice.**

The Board's first Report (R. 159) (printed as Appendix A hereto) was reversed by the Court of Appeals on Febru-

---

* The United States, as well as the Federal Maritime Board, is a respondent herein pursuant to 5 U. S. C. §1034.

** References in this Petition to the certified record, filed pursuant to Rule 21, subd. 3, of the Rules of this Court, are in the form "(R.)". Pages 1a to 28a of the certified record comprise the Petition for Review herein. Pages 1 through 232 comprise the Joint Appendix in the Court of Appeals, nine copies of which have been filed with this Court. Pages 233-336 comprise the proceedings in the Court of Appeals.

ary 13, 1959 in an opinion (R. 208) reported at 263 F. 2d 709 and printed as Appendix B.

The Supplementary Report of the Board dated May 4, 1959 (R. 215) is printed as Appendix C.

The opinion of the Court of Appeals, dated July 13, 1960, denying Grace Line's Petition for Review of the Supplementary Report and affirming the Board's order (R. 233), and the dissenting opinion of Judge Moore (R. 238), are reported at 280 F. 2d 790 and printed as Appendix D.

The order of the Court of Appeals denying Grace Line's Petition for Rehearing with Request for En Banc Consideration (R. 331) is printed as Appendix E.

Jurisdiction.

The jurisdiction of this Court to issue a writ of certiorari to the Court of Appeals is invoked under 28 U. S. C. §1254(1) (1958). The judgment of the Court of Appeals which is the subject of this Petition was dated and entered on July 13, 1960. The Petition for Rehearing duly filed by petitioner was denied on August 30, 1960.

Questions Presented.

The Board's Report and the majority opinion of the Court of Appeals raise questions of vital importance, first, to United States and foreign shipping; and, second, to the proper function of the courts in their review of administrative decisions.

These questions are:

1. (a) Whether the Shipping Act of 1916—concededly applicable to all common carriers by water which touch a port of the United States, irrespective of nationality or destination—extends to every activity of every such carrier

and thereby bars such carrier from ever acting as a contract carrier.

(b) Whether a ruling that the Shipping Act extends to every activity of such a carrier and prevents its acting as a contract carrier can be reconciled with judicial rulings (including rulings of this Court) which uniformly hold that domestic common carriers regulated by analogous statutes may act as contract carriers outside the statutory scope.

2. Whether a Court of Appeals may properly defer to a ruling of the Federal Maritime Board with respect to the scope of the Shipping Act of 1916 where:

(a) That ruling is based on the meaning of a centuries-old common law concept—"common carrier"—which fixes the scope of the statute and of the Board's power; and

(b) The Court's deference is expressly based upon presumed Board expertise in "developing . . . a merchant marine" (a phrase used in the statute's prologue), a function which the Board did not here undertake to perform, to which it never referred in either of its Reports, and as to which there is no evidence in the record.

Statutes Involved.

The statutes involved are Sections 1, 14 and 16 of the Shipping Act, 46 U. S. C. §§801, 812, 815 (1958), which are printed in full in Appendix F.

Statement of the Case.

The facts are not in dispute.

The central issue in this case, both before the Federal Maritime Board and before the Court of Appeals on two

separate reviews, is the proper scope of the Shipping Act of 1916 as it relates to petitioner's carriage of bananas from Ecuador to Atlantic ports of the United States.

Congress made portions of the Shipping Act applicable solely to interstate common carriers by water and regulated them in a fashion similar to railroads and other carriers by land governed by the Interstate Commerce Act.* Other portions of the Act were made applicable solely to international common carriers by water and regulated them less stringently. The Sections of the Act here involved were made applicable both to interstate and international water carriers, it being the obvious conclusion of the Congress in 1916 that these Sections erected a standard which could properly be expected of, and enforced with respect to, common carriers in international shipping.

The Shipping Act is hinged on the concept of "common carrier". In Section 1, the Act defines a "common carrier by water" as "a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port." That Section further defines a "common carrier by water in foreign commerce" as follows:

> "The term 'common carrier by water in foreign commerce' means a common carrier, except ferry boats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: *Provided*, That a cargo boat commonly called an ocean tramp shall not be deemed such 'common carrier by water in foreign commerce.'"

---

* In 1940, the Congress by Part III of the Interstate Commerce Act put rate and other regulation of interstate water carriers under the Interstate Commerce Commission (54 Stat. 929 (1940), as amended, 49 U. S. C. §§901-23).

There is no further definition of the phrase "common carrier". It is apparent that "common carrier" was assumed by Congress to have a sufficiently well established meaning at common law to delimit the Act's application.

The regulatory provisions of the Act involved here are exemplified by Section 14 (46 U. S. C. §812), which commences: "No common carrier by water shall . . ." and goes on to list certain proscribed practices.

The issue posed here is the proper application of this language where a single person or corporation at the same time conducts some activities which are those of a common carrier and other activities which are those of a contract carrier. Under these circumstances, does the Shipping Act regulate all of his activities or only those which constitute common carriage? It will be noted that if the Shipping Act applies to the contract carrier activities it must, of necessity, bar those activities. This is so because Sections 14 and 16 of the Act, barring "discrimination" in the rendering of services, contradict the essential nature of contract carriage, which is the provision of specialized transportation tailored to the individual needs of particular shippers on a selective basis.

Petitioner has consistently argued that, like other similar statutes regulating the common carrier, the Shipping Act was designed to regulate the common carrier by water only when acting as such. It has pointed out that the Congress could hardly have intended to exercise more stringent control over water carriers of any and all nationalities plying the oceans of the world than over railroads operating wholly within the United States.

The Federal Maritime Board and a majority of the Court of Appeals have disagreed, notwithstanding the admonition of this Court in *Lauritzen* v. *Larsen*, 345 U. S. 571, 581 (1953), that:

> ". . . the virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea."*

The proposition on which the majority opinion of the Court of Appeals rests, namely, that the Act extends to a contract carrier who is also a common carrier, was put forward by the Board for the first time since 1916 in its Supplementary Report; the proposition was not defended in the subsequent brief filed with the Court of Appeals on behalf of the Board and the United States.

Petititoner's consistent legal position in the face of shifting and inconsistent arguments of the Board has been that it may properly transport bananas as a contract carrier outside the scope of the Shipping Act where the following conditions simultaneously exist:

(1) Bananas require special care, handling and scheduling, i.e., bananas are a "specialty"; and

(2) Petitioner has not held itself out to the public as a common carrier of bananas.

Petitioner has consistently conceded that the Board has initial jurisdiction to determine whether these conditions exist. It has also consistently conceded that the Board

---

* The *Lauritzen* case dealt with the question whether a statute of the United States (the Jones Act) was applicable to a particular transaction. Here it is clear that the Shipping Act applies to transactions involving foreign carriers. It is submitted, however, that this Court's caveat in the *Lauritzen* case is as relevant in determining how a statute affects foreign transactions as it is in determining whether it affects them.

has full jurisdiction to insure that petitioner's common carrier activities are in no way injured by its specialized services as a contract carrier of bananas.

Grace Line's Contract Carriage of Bananas.

Prior to the early 1930's petitioner had never carried bananas between Ecuador and the United States and had no facilities appropriate to their carriage (R. 37). At the same time, petitioner consistently had empty space on its northbound vessels (R. 37).

In order to generate additional northbound traffic, petitioner undertook a thorough and extensive investigation to determine what new commodities might be carried. It concluded that it could meet the special needs of the banana trade by installing special refrigerated and ventilated compartments in its vessels (R. 37). At the cost of a very considerable investment it altered its vessels extensively for that purpose (R. 37).

In 1934 petitioner executed a long-term contract with a banana shipper whereby the shipper agreed to use the space made available by petitioner and petitioner agreed to provide the precise scheduling of voyages and the specialized handling in transit which banana carriage requires (R. 37-40). The undertaking was highly speculative since this was the first time that the regular carriage of bananas on a voyage of such duration had been attempted (R. 37).

Because of the specialized requirements of the banana trade, described in the majority opinion (App. 36a-37a)* and in the dissent of Judge Moore (App. 40a-41a, 45a-52a), Grace Line has continuously since 1934 made its facilities available only under special long-term contracts with a limited number of shippers (never more than three at once) (R. 184-86).

---

* References in the form "(App.)" are to the Appendices to this Petition.

Throughout this case petitioner has pointed out, and the Board has not disputed, that in providing a contract carriage service of this kind petitioner has followed a practice pursued by all regular ocean carriers of bananas. Petitioner believes that it is the first water carrier anywhere in the world to be told that it must attempt to operate as a common carrier of bananas. It is undisputed that from 1946 to the date of the record petitioner had received requests for banana space from 31 persons and firms in addition to the two complainants and five intervenors in the present proceedings.

The Proceedings Below.

The proceedings before the Board were in the form of a consolidated hearing on two complaints under the Shipping Act of 1916, 46 U. S. C. §§801-42 (1958), in which reparations totaling $4,800,000 were sought. The hearing was devoted to the question of liability; a hearing on the amount of reparations, if any, was deferred until after determination of liability.

As is pointed out below,* the Board's position in this proceeding, and in prior proceedings involving the same issue, has been a remarkable example of administrative vacillation and uncertainty. An effort will be made here to outline only the principal positions taken by the Board and ruled on by the Court of Appeals.

In its first Report the Board assumed, in line with a series of decisions by it and its predecessors over the years, that the Shipping Act regulates only those activities which constitute common carriage at common law. It ruled, however, that *at common law* a carrier must be regarded as a common carrier with respect to all commodities "sus-

* pp. 31-34, *infra*.

ceptible" of common carriage. The Board found bananas "susceptible" of common carriage, and held petitioner to be a common carrier of this commodity.

On review of this Report pursuant to 5 U. S. C. §§1033-34 (1958) the Court of Appeals (Judges Swan, Medina and Waterman; opinion by Judge Waterman) unanimously rejected the Board's "susceptibility" doctrine. The Court held that the Board's decision had no "'rational' or 'reasonable' foundation in law . . ." and that "a test based upon susceptibility only tends, in effect, to eliminate contract carriage," since most, if not all, commodities are "susceptible" of common carriage. The Court held that:

> "This susceptibility test would appear to be clearly contrary to the Congressional purpose, for it is obvious that Congress intended that section 14 and 16 should apply not to all carriers but only to 'common' carriers by water" (App. 16a).

Upon remand, the Board "upon further consideration without arguments or hearings" (App. 21a) and on the same record issued a Supplementary Report and Order reaching the same result.

The Supplementary Report was not at all clear in its statement of the new grounds advanced in support of the Board's decision. One of several inconsistent arguments advanced by the Board was that "The entity which constitutes a 'common carrier by water in foreign commerce' is subject to the provisions of the Act and the jurisdiction of this Board" (App. 25a). According to this argument, it is irrelevant whether the carrier's activities would constitute common carrier or contract carrier activities at common law; as long as any activity of the carrier is a common carrier activity, every activity of the carrier is subject to the Act.

The majority opinion on the second review adopted this rationale, in spite of the fact that respondents' brief to the Court did not defend it.

The majority opinion concedes, in effect, that petitioner is not a common carrier of bananas at common law and assumes "*arguendo*" that petitioner has no common law duty to attempt to make its banana facilities available to all shippers (App. 38a).*

The majority opinion holds, however, without citing any authority whatever, that the Board was justified in extending the Shipping Act to all activities of anyone who is in any degree a common carrier.

In reaching this result the majority opinion relies heavily on the presumed expertise of the Board in determining what will prejudice and what will promote "the developing of a merchant marine," a phrase used in the prologue of the Shipping Act in describing the purpose of the Act. As is pointed out below, however, the Board in no way considered the relation of petitioner's banana carriage to the development of a merchant marine and no evidence relating to such a determination is in the record.

In rejecting the majority's construction of the Shipping Act, Judge Moore said:

> "I cannot subscribe to the opinion that Congress intended by its statutory language or by implication to deprive the owner of a vessel or vessels generally engaged in common carriage of the privilege of devoting a small portion of its property to special use by persons with whom for good and sufficient reasons of commercial expediency it has made special contracts" (App. 49a).

---

* It will be noted that on the theory of the Board's original Report in this case, and a series of earlier decisions interpreting the Shipping Act, these concessions would have disposed of the matter in petitioner's favor.

He also took the position that:

> "Had Congress wished to outlaw contract carriage by common carriers, it would have or should have so legislated" (App. 52a).

Grace Line petitioned for rehearing and requested en banc consideration by the Court of Appeals, urging that the importance of the case to the international shipping industry and the disregard by the majority of important considerations affecting the proper construction of the Shipping Act made such reconsideration appropriate. The rehearing was denied. Judge Moore concurred in the denial "only because reconsideration on a rehearing would not change the result" (App. 54a).

REASONS FOR GRANTING THE WRIT

I.

The importance of the construction of the Shipping Act approved by the decision below and the clear error in that construction require review by this Court.

The essence of the opinion of the majority of the Court of Appeals is its approval of a construction of the Shipping Act which would make that Act applicable to every activity of a common carrier even though some of those activities constitute contract carrier activities at common law.

The Impact of the Decision.

The suggestion that the phrase "common carrier" as used in the Shipping Act requires the application of the Act to all of the activities of every person who is to some degree a common carrier was made by the Board for the first time after the Court of Appeals had rejected the reasoning upon which its original Order had been based.

The Board and its predecessors had never before suggested that the statute should be so construed and, indeed, they had frequently ruled that the scope of the Act was limited to activities which constituted common carriage at common law.* It is particularly significant that neither the Board's Supplementary Report nor the majority opinion of the Court of Appeals even mentions the possible impact of this new doctrine, nor considers the fact that numerous decisions of the Board and its predecessors have been overruled *sub silentio*.

This radically new construction of the scope of the Act will have an important impact on international shipping. The Shipping Act applies not only to United States citizens and companies, but also to the owner of any vessel which loads or discharges any general cargo at an American port. Indeed, in a Report dated June 22, 1959 (5 F. M. B. 633), the Board found that Flota Mercante Grancolombiana, S. A., a foreign company engaged in international shipping and a carrier of general cargo between Ecuador and United States ports, was a common carrier by water in the foreign commerce of the United States and therefore subject to the Shipping Act and the jurisdiction of the Board. On facts similar to those involved here the Board held that Grancolombiana's contract carriage of bananas on this itinerary was subject to, and barred by, the Act. A petition for review in that case was filed in the United States Court of Appeals for the District of Columbia on August 20, 1959, and proceedings in that case have been held in abeyance pending disposition of this Petition.

In addition to these particular instances involving banana carriage, it is apparent that the wide scope given to the Act by the Board and by the majority opinion affirm-

* See pp. 31-32, *infra*.

ing the Board's order will have a vital and far-reaching effect on all shipping which touches United States ports.

First of all, it is a direct consequence of the decision that all common carriers who presently set aside a portion of the space on their common carrier vessels for contract carriage of particular specialized commodities will henceforward be subject to the Shipping Act with respect to their contract carrier activities as well as their common carriage. In this category of cases, for example, would be the kind of situation involved in *Pan Atlantic Steamship Corp.—Exemption, Section 303(e)*, 285 I. C. C. 752 (Div. 4, 1956), *aff'd sub nom. Sea Train Lines Inc.* v. *United States*, 152 F. Supp. 619 (D. Del. 1957), *aff'd*, 355 U. S. 181 (1957). In that case Pan Atlantic was allowed to operate, exempt from regulation, as a contract carrier of petroleum while at the same time and on the same vessel operating as a common carrier of general commodities transported as deck cargo.*

The doctrine of the Court of Appeals is not, however, restricted to the situation where a carrier has a dual status on the same vessel. Rather, the Court of Appeals has ruled—and, given the nature of its reasoning, it could not have ruled otherwise—that the Act applies to every activity of a carrier which is to some degree a common carrier. Thus, where a single person or corporation owns vessels engaged in common carriage and also operates other vessels in contract carriage on the same or different routes, the Act would apply to both the contract carrier vessels and the common carrier vessels. It would thereby effectively bar

* The result in the *Sea Train* case itself would of course not be affected by the decision here since that case involved, not foreign, but interstate commerce, which—under Part III of the Interstate Commerce Act, 49 U. S. C. §§901-23, enacted subsequent to the Shipping Act—is comprehensively regulated both as to common and as to contract carriage. It is extraordinary that the Board and the Court below have reached a result as to international shipping more rigorous than the rule applicable to interstate water carriers.

the contract carrier operations, including those where an entire vessel was devoted to a commodity shipped by a single shipper—the traditional maritime "bailee for hire".

The ramifications of the Court's decision may be illustrated by the hypothetical situation where a vessel owned by Norwegians, flying a Norwegian flag, and manned by Norwegian citizens carries a single commodity in common carriage to or from a United States port on a route between South America and Europe. The decision below makes the owner of such a vessel subject to the Shipping Act with respect to all of its carriage to or from a United States port even though such other carriage would, considered alone, constitute contract rather than common carriage.

Moreover, under the ruling below, if the Norwegian carrier hypothesized above operated vessels devoted entirely to a single shipper, those vessels would be subjected to the Shipping Act as well and their owner would be required to transport on those vessels goods offered by all other shippers of all other commodities.

Petitioner submits that the decision below will have consequences injurious not only to the banana industry but also to the day-to-day operations of international shipping. It was reached by a Court and a Board which did not even consider the possibility of such consequences—and in the face of cases, cited below, holding domestic common carriers to be free to do what the decision below condemns.

The Majority Below Misconstrued the Language of the Shipping Act:

The ruling of the majority, insofar as it is based on the language of the Shipping Act, depends upon the phrase "No common carrier shall • • •" as used in Section 14 of

the Act, and the phrase "It shall be unlawful for any common carrier by water to * * *" in Section 16 of the Act.

The opinion construes this language to mean that anyone who is in any degree a common carrier is circumscribed by the requirements of the Shipping Act with respect to everything he does. The opinion finds no "verbal necessity" for adding to the phrase "common carrier" the additional phrase "while acting as such" (App. 39a).

The majority opinion cited no authority whatever for this construction of the language used in the Act.

In point of fact there is a "verbal necessity" to read some limiting phrase after the phrase "common carrier" if the Act is to make sense.

It is inconceivable that the Shipping Act was designed to reach every activity of a company engaged in common carriage. Certainly the requirement of Section 16 prohibiting the giving of an undue or unreasonable preference or advantage to any person "in any respect whatsoever" does not mean that a company which operates a fleet of vessels as a common carrier and also manufactures computing machines is obliged to sell its computing machines to all who seek them.

To avoid absurd results like this, some limitation must be derived from the phrase "common carrier". The only limitation which can properly be derived from this language is a limitation to common carrier activities. Examination of authorities construing similar language in other statutes makes it plain that this is the proper construction of the Shipping Act.

There are numerous examples, for instance, under the Interstate Commerce Act. The language of that Act, insofar as it is relevant here, is substantially similar to the language of the Shipping Act. Thus, Section 1(1) of the Interstate Commerce Act, 49 U. S. C. §1(1), states that:

> "The provisions of this chapter shall apply to common carriers engaged in . . . [interstate transportation of passengers and property]."

It will be noted that this section does not contain the limiting phrase "while acting as such" or "while engaged in transportation as a common carrier." Moreover, the specific provisions of the Interstate Commerce Act are analogous to the Sections of the Shipping Act here at issue; for example, Section 1(4), 49 U. S. C. §1(4) commences: "It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor; * * *," etc.

This Court has recognized that, under these provisions, the Interstate Commerce Act does not apply to every activity of a carrier merely because some of his activities constitute common carriage. In *Kansas City Southern Railway* v. *United States*, 282 U. S. 760 (1931), this Court said:

> "There is no doubt that common carriers subject to the Interstate Commerce Act may have activities which lie outside the performance of their duties as common carriers and are not subject to the provisions of the Act." (p. 764)

Very recently the Court of Appeals for the Sixth Circuit applied this same principle in *United States* v. *Louisville & Nashville Railroad*, 221 F. 2d 698 (6th Cir. 1955). The Court there held that:

> "... a common carrier acting outside the performance of its required duties to transport goods which it is not required to carry may contract as a private carrier ..." (p. 703)

The Court reached this decision despite the fact that the Government had argued in the case that:

> "There is no provision of the Interstate Commerce Act which authorizes a common carrier to shed its common carrier cloak and assume a private carrier mantle free to enter into private contracts for the transportation of property with the Government or with anyone else . . . Having decided to carry these articles, it can do so only as a common carrier. It must establish a rate and file it with the Interstate Commerce Commission . . ." (Brief for Appellant, *United States* v. *Louisville & Nashville Railroad*, p. 57)

The similarity between the argument made by the Government in the *Louisville & Nashville* case and the argument of the Court of Appeals for the Second Circuit in this case is striking. See also *Northern Fur Co.* v. *M., St. P. & S. S. M. Railway*, 224 F. 2d 181 (7th Cir. 1955), *cert. denied*, 350 U. S. 900 (1955), where the Court held that a railroad was a "carrier" but not a "common carrier" of express and therefore not required to file a tariff with respect to a provision in an express receipt.

This Court has pointed out that the Shipping Act was passed after more than a generation of experience with the Interstate Commerce Act and that

> ". . . the two Acts, each in its own field, should have like interpretation, application and effect." *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474, 481 (1932).

Even prior to the enactment of the Shipping Act, the Interstate Commerce Commission had occasion to consider the question whether the Interstate Commerce Act applied to activities of a common carrier which did not themselves constitute common carriage. In *Manufacturers Railway Co.* v. *St. Louis, Iron Mountain & Southern Railway*, 21 I. C. C. 304 (1911), the Commission held that some of the

services rendered by the carrier might well be "plant-facility" services which were outside its common carrier services (p. 316). Commissioner Lane, in a concurring opinion, expressed this same idea when he said:

> "As a common carrier it is entitled to recompense for the service which it gives; as a plant facility we have nothing to do with it." (*Ibid.*)

Similarly, in *Grasselli Chemical Co.* v. *Central Railway Co. of New Jersey*, 81 I. C. C. 562 (1923), Division 3 of the Commission held that:

> "The furnishing of the cars, locomotives and crew to complainant did not make the act performed a service of common carriage merely because the owner was a common carrier or because at other times and places the same equipment was used in common carriage . . . ."

Division 1 of the Commission followed this same rule in *Certain-teed Products Corp.* v. *Chicago, Rock Island & Pacific Railway*, 68 I. C. C. 260, 262 (1922).

It is not only under the Interstate Commerce Act that language like that used in the Shipping Act has been construed to make a statute regulating common carriers applicable only to common carrier activities. For example, in *Terminal Taxicab Co.* v. *Kutz*, 241 U. S. 252 (1916), this Court construed an Act of March 4, 1913, 37 Stat. 938, 974, which required that "every public utility" obey certain orders of the Public Utility Commission of the District of Columbia. "Public utility" was defined to include "every common carrier." This Court held, in an opinion by Justice Holmes, that a taxicab company, which was admittedly engaging in the common carriage of passengers to and from a certain railroad station, was nevertheless not subject to

the requirements of the Act with respect to other transportation which did not constitute common carriage.

State courts have reached the same result. In *Cooperative Legislative Committee* v. *Public Utilities Com'n*, 149 Ohio 511, 80 N. E. 2d 159 (1948), the Court construed a statute which made it "unlawful for any common carrier . . . to operate" a locomotive unless manned by a full crew. The Court held that a railroad which was admittedly a common carrier was not subject to the statute when it operated equipment belonging to a steel company within the company's plant. See also *Mt. Tom Moto. Lines* v. *McKesson & Robbins, Inc.*, 325 Mass. 45, 89 N. E. 2d 3 (1949); *Baltimore Tank Lines* v. *Public Service Commission*, 215 Md. 125, 137 A. 2d 187 (1957).

In the face of these authorities neither the majority of the Court of Appeals, nor the Federal Maritime Board, nor counsel for the Board has cited a single authority in support of the interpretation of the Shipping Act adopted below.

The Majority Below Misconceived the Intent and Purpose of the Shipping Act.

When this case was first before the Court of Appeals, the Court set aside the Board's Report and Order, rejecting the Board's contention that a common carrier is necessarily a common carrier with respect to all goods "susceptible" of common carriage. The Court pointed out that such a test "tends to eliminate contract carriage" and is therefore "clearly contrary to the Congressional purpose" (App. 16a).

The Court's opinion on the first review made it perfectly clear that not every activity of a common carrier is subject to the Shipping Act and to Sections 14 and 16, since it ruled that even when it carries items "susceptible" of common carriage, a common carrier may not be subject to the Shipping Act.

As Judge Moore pointed out in his dissenting opinion on the second review, the decision of the majority on that review is "directly contrary" to the ruling on the first review.

1. Legislative History

The background and legislative history of the Shipping Act strongly support the view that its scope was coterminous with those activities which constituted common carriage at common law and that it was not intended to affect contract carriers or contract carriage.

In considering the Bill which was enacted as the Shipping Act of 1916, Congress evidenced intense concern with the common law meaning of the phrase "common carrier". Representative Alexander introduced into the record in the course of the hearings a brief on the common law meaning of that phrase. *Regulatory Features of Shipping Bill, Hearings before the Committee on Merchant Marine & Fisheries, House of Representatives*, 64th Cong., 1st Sess., on H.R. 14,337, April 13-22, 1916, p. 194.

In the course of the debate on the Bill, Representative Alexander pointed out that:

> "It is only when a vessel engages in business as a common carrier that it comes within the provisions of this Bill" (53 Cong. Rec. 15,365).

In the Congressional discussion of the Bill, it was made clear that it might apply to some activities of a particular vessel or a particular carrier without applying to all of them. Thus Representative Alexander said:

> "There is a large amount of the business done by so-called Tramp Steamers that makes those steamers come within the definition of common carriers. In other words, they go on berth and take miscellaneous

> freight just like any other steamship, but when I charter a ship to carry a cargo of wheat for me, of wheat or coal or any other commodity, then the carrier is a *bailee for hire for me for a stipulated price for that service and for a particular voyage and would not come under the bill*" (53 Cong. Rec. 8268) (emphasis supplied).

And Representative Towner pointed out, with respect to tramp steamers, that:

> "They do not go from one port to another on regular schedules. They go all over the world, their only object being that when they take a shipment of goods from one port to another port they shall be able to receive a cargo from that port to some other port. *And as long as that character of traffic continues, they are not common carriers, but only bailees for hire and not within the provisions or terms of this law*" (*Ibid.*) (emphasis supplied).

The decision below is directly contradictory of this legislative history since its necessary consequence is to put the "bailee for hire" under the Act if its owner is in any other respect a common carrier.

To a large degree the requirements of the Shipping Act correspond to requirements imposed upon common carriers at common law. Thus, the common law demanded of a common carrier that he make his facilities available without discrimination to all who sought them. The majority opinion below concedes that at common law a common carrier may also be a contract carrier with respect to some portion of his facilities. The overriding of this common law rule would surely have been evidenced in the statute by some specific language directed to that purpose.

A further indication of the Congressional intent is the fact that if the Shipping Act of 1916 had sought to compel

a carrier offering a contract carrier service to make that service available in common carriage, it would have raised a serious Constitutional question.

For example, in *Northern Pacific Railway Co.* v. *State of North Dakota,* 236 U. S. 585, 595 (1915), decided prior to the passage of the Shipping Act, this Court pointed out that a common carrier may not constitutionally be compelled by legislation to provide common carriage outside the scope of its holding out as a common carrier. Similarly, in *Frost & Frost Trucking Co.* v. *Railroad Commission of California,* 271 U. S. 583 (1926), this Court stated:

> "That, consistently with the due process clause of the Fourteenth Amendment, a private carrier cannot be converted against his will into a common carrier by mere legislative command, is a rule not open to doubt and is not brought into question here" (p. 592).

See also *Smith* v. *Cahoon,* 283 U. S. 553 (1931); *Michigan Public Utilities Commission* v. *Duke,* 266 U. S. 570 (1925); *Producers Transportation Co.* v. *Railroad Commission of California,* 251 U. S. 228 (1920).

It is submitted that the reach given to the Act by the decision below could not have been intended by Congress when the Act was adopted.

2. Reasoning of the Opinion Below.

The majority opinion states that "there is every reason of declared policy" to assume that the term "common carrier" was used to include all those who were to some degree "common carriers" (App. 39a). Petitioner, of course, agrees that the term "common carrier" includes anyone who is "to some degree" a common carrier. The majority opinion rules, however, that the "declared policy" to which it refers requires that Sections 14 and 16 of the Act

should be applied, not only to every person who is to some degree a common carrier, but also to every activity of any such person.

The majority's effort to derive such a policy is completely circular. The opinion refers to nothing other than the language of Sections 14 and 16 themselves as a source for such a policy. To argue, however, that Sections 14 and 16 should be applied to every activity of a common carrier because their language evidences a "declared policy" to that effect begs the question. It assumes that the policy stated in those Sections was to apply to contract carrier activities conducted by a common carrier; this is the precise question at issue. The circularity of the majority opinion's argument is also apparent in its statement that:

> "... when Congress enacted authoritative supervision over the equal treatment of shippers it could not have meant to perpetuate what, so far as it may perhaps still exist at common law, would be an exception to the primary purpose of the statute as a whole" (App. 39a-40a).

The fact of the matter is that Congress did not by any means enact "authoritative supervision over the equal treatment of shippers." For example, since there was no effort to regulate persons who engaged solely in contract carriage, there was, of course, no "supervision", authoritative or otherwise, with respect to the equal treatment of shippers who dealt with such persons. The majority opinion offers no reason why contract carriage must be pursued exclusively to be held proper. Since petitioner concedes that the Board has jurisdiction to prevent a dual-status carrier from injuring its common carrier services, it is submitted that no reason for the distinction exists.

The question at issue here is merely whether a person who is a contract carrier is barred from continuing as such because he also engages in common carriage activities. The majority opinion points to no declared policy whatever which is relevant to the solution of this question.

Since the majority decision of the Court of Appeals ignores both the language and the purpose of the Shipping Act and since it has a broad and vital impact on United States and foreign shipping, it is submitted that review by this Court is clearly appropriate.

II.

The decision of the Court of Appeals constitutes such a departure from the proper course of judicial proceedings on review of administrative action as to require review by this Court.

The second issue which, it is submitted, requires this Court's attention relates to the proper function of a federal Court in reviewing administrative action and the proper distribution of authority between the Court and the agency.

The majority opinion below relies on the view that "The Board is prima facie better qualified than are courts" to determine whether the activities of a carrier will "prejudice the 'developing of a merchant marine' . . . ." (App. 39a).

It is apparent that the majority opinion of the Court of Appeals is based on two assumptions: first, that the Board's decision that Grace Line's contract carriage of bananas is subject to, and proscribed by, the Act, depended in part upon a determination by the Board that this contract carriage would prejudice the development of a merchant marine [In fact, the Board made no such determination, nor

is there any reference in its Report or in the record to this question.]; and, second, that the Board is better qualified than the courts to make this determination [even though the determination involves the jurisdiction of the Board and is dependent on a common law concept—"common carrier"].

It is submitted that the Court's deference to the Board under these circumstances and the grounds of that deference raise an important question with respect to the proper scope of judicial review of administrative action.

Petitioner does not, of course, quarrel with the well established principle that administrative agencies are not to be rigidly confined or controlled by the courts and that they must be allowed an ample discretion in many areas, particularly where the agency is better qualified by its expertise to resolve a problem.

Recognition of this principle does not, however, obviate the necessity for the courts to confine statutes to their intended scope, especially when they are so obviously premised on the common law.

The authority and functioning both of the agencies and of the courts are impaired where the court abdicates its proper function even though every accepted rubric calls for its exercise. The impairment of the court's authority is even more serious where the expressed basis for the court's deference to the agency formed no part of the agency's determination.

The Majority's Reason for Deferring to the Board is Insupportable.

It may be noted at the outset that on the first review by the Court of Appeals, involving precisely the same basic issue presented here, the Court found no reason to defer to

the Board's determination and made no reference to administrative expertise. The Court pointed out that there are "minimal standards beyond which the Court cannot allow administrative bodies to go" and found that the administrative decision had no rational or reasonable foundation in law.

On the second review, the Court ignored the approach taken on the first.

The majority's analysis on the second review is deficient in two respects. First, it is not at all clear that the Board, in performing its functions with respect to the regulation of common carriers by water, may properly consider whether the particular activities which are the subject of the proceeding advance or retard the development of a merchant marine. Second, it is perfectly clear that in this case the Board did not even consider the effect of petitioner's status as a contract carrier of bananas on the development of the merchant marine and, indeed, there was no evidence in the record before the Board bearing on that issue.

The prologue to the Shipping Act, from which the majority sought to derive the Board's function of encouraging and developing a merchant marine, reads in its entirety as follows:

> "An Act to establish a United States Shipping Board for the purpose of encouraging, developing and creating a naval auxiliary to the naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its territories and possessions and with foreign countries; to regulate carriers by water engaged in the foreign and interstate commerce of the United States; and for other purposes."

It will be noted that this prologue sets out two distinct purposes: the first, to develop a naval auxiliary and

merchant marine, and the second, to regulate common carriers by water. Just as the prologue naturally divides into two separate parts, so the Shipping Act itself consists of two parts. The first part of the Act, up to and including Section 13, relates to such matters as construction in American shipyards of vessels for the naval auxiliary and for other purposes; the creation of the United States Shipping Board empowered to form a corporation with an authorized capital of $50,000,000 for the purposes, *inter alia*, of constructing, purchasing, and chartering vessels in turn to be chartered, leased and sold to private citizens; the transfer of vessels from the War and Navy Departments to the jurisdiction of the Shipping Board; and other functions clearly aimed at the development of the American merchant marine.

The rest of the Act, commencing with Section 14, relates to the regulation of common carriers by water in interstate and foreign commerce. It is evident that the language of the prologue relied on in the majority opinion was designed to express the purpose of those Sections of the Shipping Act up to Section 13, rather than those Sections relating to the regulation of common carriers.

The policy of encouraging and developing the merchant marine has no obvious connection with the issue presented here. The Board made no effort whatever to relate its action in this case to the development or encouragement of the merchant marine. There is nothing in the Examiner's report, the Board's original Report, or the Board's Supplementary Report, to indicate that the Board found any impairment of the maintenance of the merchant marine or that petitioner's activities would in any way prejudice the development of a merchant marine. Nor was there any reference to the prologue of the Shipping Act. The opinion of the Court of Appeals thus finds support for the Board's

order in a finding which the Board never made and for which there was no evidence anywhere in the record.

If petitioner's activities are to be held unlawful because they prejudice the development of a merchant marine, and if petitioner is to be subject to reparations on that account, there should at least be a considered determination by the Board that this prejudicial effect exists and some evidence in the record to show that it does. Consequences of such importance to these parties and to the shipping industry should not depend upon an attempted reading of the unexpressed and unexplorable workings of the administrative mind.*

Administrative action must be judged by a court solely on the grounds given for that action by the administrative body. Indeed, the Court of Appeals recognized this very principle on the first review of this case when it said:

> "We must judge the propriety of the Board's action solely on the grounds . . . invoked by it" (App. 16a),

citing *Securities and Exchange Commission* v. *Chenery Corporation*, 318 U. S. 80, 87, 88 (1943), 332 U. S. 194, 196 (1947), *rehearing denied*, 332 U. S. 783 (1947). If this is true, then it must certainly follow that the court may consider only the grounds relied on by the agency in determining whether or not the agency's determination may properly be deferred to on the ground of the agency's expertise. The court may not properly supply reasoning omitted by

---

* If the Board were to consider the effect of Grace Line's banana carriage on the development of the American merchant marine, it would be necessary for the Board to take into account, among other things, whether the requirement that Grace Line attempt to operate as a common carrier of bananas might have damaging effects on Grace Line's ability to compete with foreign flag tramp vessels which are specifically exempted from regulation under the Shipping Act and are able to devote themselves to the special needs and interests of a few selected banana shippers.

the agency and then defer to the agency decision because of the expertise necessary to employ that reasoning.

If the Board's decision can properly be upheld on the basis asserted by the majority below, then review of administrative action can always be circumvented. The effect of the Court's decision is that if an agency has expertise in any area under its jurisdiction which would require the deference of a court, the court must defer to the agency in all cases, whether or not the agency demonstrates that there is any relation between the particular decision under review and the area of its expertise, and whether or not it in fact uses its expertise in deciding the case.

The Court was Fully Competent to Weigh and Reject the Board's Decision.

Analysis of the issues involved in the Board's decision makes it plain that there is present in this case nearly every consideration which has been customarily regarded as making judicial review of agency action appropriate and necessary. The Board's order related to the determination of its jurisdiction under the governing statute. The decision was based on the interpretation of statutory language adopted from the common law. Finally, the Board's treatment of the issue involved here has been vacillating and uncertain.

It is clear that the Shipping Act purports to regulate only the "common carrier" and that the Board's jurisdiction is therefore limited to the regulation of such carriers. It is therefore also apparent that when the Board seeks to regulate a contract carrier merely because he is also acting as a common carrier a jurisdictional question is raised. It is, of course, well settled that an administrative agency cannot finally determine its own jurisdiction. *National Labor Relations Board* v. *Highland Park Manufacturing*

Co., 341 U. S. 322, 325 (1951); *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express*, 351 U. S. 49, 54 (1956); *Social Security Board* v. *Nierotko*, 327 U. S. 358, 369 (1946).

It is equally apparent that the materials relevant in determining whether the Shipping Act and the Board's jurisdiction extend to petitioner's contract carriage of bananas are precisely those materials as to which the court's capacity of evaluation is equal, if not superior, to that of the agency.

Thus, the crucial question is whether, when Congress said that "No common carrier shall" engage in certain activities, Congress meant that no common carrier should engage in such activities while acting as a common carrier. This depends, in turn, on the common law history of the phrase used in the Shipping Act and on the normal and natural meaning of the words in the context in which they were used. Also relevant is the authoritative construction of similar language used in other statutes.

It is precisely in such a situation that the authority and capacity of the courts have been consistently reaffirmed.

As Professor Davis has pointed out:

> "On ordinary problems of interpreting statutes, except when the subject matter is technical and non-legal, the courts are the specialists, whether analysis of legislative history is called for, or whether the main process is one of finding the meaning of the words." 4 Davis, *Administrative Law Treatise*, 242 (1958 ed.)

This Court has not been reluctant to set aside administrative action involving issues of the kind presented here. For example, in *United States* v. *Contract Steel Carriers, Inc.*, 350 U. S. 409 (1956), this Court quite recently had occasion to suggest that the differences between common and contract carriage and the regulatory consequences of such a classification are not so esoteric a subject that the

courts are without competence to deal with it. Similarly, in *Davies Warehouse Co.* v. *Bowles*, 321 U. S. 144 (1944), this Court had no difficulty in reversing a determination of the United States Price Administrator that a public warehouse was not a "public utility" within the meaning of the Emergency Price Control Act. See also *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956).

Finally, it is plain that the Board's determination here was not entitled to the Court's deference, since the Board's position over the years, and even in this single case, has been vacillating and uncertain rather than consistent and definite.

Over a period of years the Board and its predecessors have consistently taken the position that a carrier may be both a common carrier subject to the Shipping Act and a contract carrier not subject to the Act. For example, in *New York Marine Co.* v. *Buffalo Barge Towing Corp.* 2 U. S. M. C. 246 (1939), the Maritime Commission found that a barge line was a contract carrier unregulated by the Shipping Act although it also engaged in common carriage under tariffs filed with the Commission. See also *Puerto Rican Rates*, 2 U. S. M. C. 117 (1939), and *In the Matter of Agreements 6210*, 2 U. S. M. C. 166 (1939). In *Transportation by Mendez & Co.*, 2 U. S. M. C. 717, 721 (1944), the Maritime Commission stated that "a carrier may be both a common and a contract carrier . . .", and in *Philip R. Consolo* v. *Grace Line Inc.*, 4 F. M. B. 293 (1953), the Board quoted that language with approval.*

The *Consolo* case was the first occasion on which the Board considered Grace Line's banana carriage. Although the Board held that carriage subject to the Act, it did so on the basis of an assumed common law rule that dual carrier status on the same vessel is improper.

---

* No final order on the merits was ever entered in the *Consolo* case since the controversy was terminated prior to Board order.

In its original Report in this case, the Board eschewed the *Consolo* theory and adopted the "susceptibility test" which the Court of Appeals rejected on the first review.

In its Supplementary Report, the Board advanced three inconsistent measures of its jurisdiction; only in the first did the Board assert the proposition—unique in the interpretation of a statute then 43 years old—that the scope of the Act is not coterminous with, and determined by, the common law. The Board's three separate propositions were as follows:

> (1) The "entity" which constitutes a common carrier by water in foreign commerce is subject to the provisions of the Act with respect to all of its activities, even those which are not common carrier activities at common law (App. 25a).
>
> (2) The Act applies only to those activities of a common carrier which constitute common carriage at common law, but at common law a carrier "may not lawfully assume the status of a contract carrier to any shipper on its common carrier vessels. . . ." (the *Consolo* theory) (App. 30a).*

---

* The short answer to this contention may be found in the following cases which demonstrate that, at common law, a carrier may act as common and contract carrier on the same vehicle or vessel at the same time: *Express Cases*, 117 U. S. 1 (1885); *United States* v. *Louisville & Nashville Railroad*, *supra*; *Northern Fur Co.* v. *M. S. P. & S. S. M. Ry.*, *supra*; *Long* v. *Lehigh Valley R. Co.*, 130 Fed. 870 (2d Cir. 1904); *Bankers' Mutual Casualty Co.* v. *M., S. P. & S. S. M. Ry.*, 117 Fed. 434 (8th Cir. 1902); *Dickson* v. *Great Northern Railway*, 18 Q. B. D. 176 (C. A. 1886); *Honeyman* v. *Oregon & C. R. Co.*, 13 Ore. 352, 10 Pac. 628 (1886); *Lake Shore & Michigan Southern R. R.* v. *Perkins*, 25 Mich. 329 (1872); *Farmers and Mechanics Bank* v. *Champlain Transp. Co.*, 16 Vt. 52 (1844); *Cleveland, C., C. & St. L. Ry. Co.* v. *Henry*, 170 Ind. 34, 83 N. E. 710 (1908); *Roberts* v. *Chicago, R. I. & P. R. Co.*, 99 F. Supp. 895 (D. Minn. 1951); *Russell* v. *Pittsburgh C., C. & St. L. Ry. Co.*, 157 Ind. 305, 61 N. E. 678 (1901); *Louisville N. A. & C. Ry.* v. *Keefer*, 146 Ind. 21, 44 N. E. 796 (1896); *Spanable* v. *New York Cent. R. Co.*, 60 Ohio App. 50, 69 N. E. 2d 441 (Ct. App. Franklin Co. 1946); *Central Railroad & Banking Co.* v. *Lampley*, 76 Ala. 357 (1884).

(3) The Act extends only to those activities of a common carrier which constitute common carriage at common law, but at common law every commodity carried on a vessel engaged in common carriage is carried in common carriage unless the commodity is "of such kind as to be liable to extraordinary danger, or such as [the carrier] is unaccustomed to convey . . ." (App. 29a-30a).*

The brief submitted by the Board and the United States on the second review made no effort to defend the Board's first proposition set out above, which the majority opinion of the Court of Appeals adopted. The brief instead principally argued in support of the third contention of the Supplementary Report described above.** The brief specifically disavowed the contention advanced in the Supplementary Report and adopted by the Court of Appeals that the Shipping Act extends to every activity of a common carrier, for example, contract carriage on vessels owned by a common carrier, but not engaged in common carriage (Respondents' Brief, p. 15).

---

* The short answer to this contention may be found in the following cases, which demonstrate that a non-dangerous commodity may be regularly carried in contract carriage so long as it is a "specialty" which the carrier has never held itself out to the public to convey: *Express Cases*, *supra* (express not carried by railroads in common carriage though service provided for 30 years); *Michigan Public Utilities Commission* v. *Duke*, 266 U. S. 570 (1925); *United States* v. *Louisville & Nashville Railroad*, *supra* ("numerous shipments made at diverse times, under diverse schedules, between diverse points, and under diverse rates"); *Dickson* v. *Great Northern Ry.*, *supra* (18 Q. B. D. at 183); *Lake Shore & Michigan Southern Railroad* v. *Perkins*, *supra*.

** The only argument advanced in the brief which was not based on the common law was an argument that the Shipping Act extends to all ocean vessels other than tramps or ferry boats. It will be noted that this argument differs from the statutory argument asserted by the Board and indeed is in direct conflict with prior Board authority. *Galveston Chamber of Commerce* v. *Saguenay Terminals*, 4 F. M. B. 375 (1954).

This Court has recently made it perfectly clear that the Federal Maritime Board's judgment is open to question where its rulings have not made a consistent pattern. In *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U. S. 481 (1958), this Court said:

> "... we are here confronted with a statute whose administration has been shifted several times from one agency to another, and it is by no means clear that the Board and its predecessors have taken uniform and consistent positions in regard to the validity of dual rate systems under Section 14 Third." (356 U. S. at 500).

This language is precisely applicable here and justifies a searching review of the Board's action.

The deference of the Court of Appeals to the Board's presumed expertise was unjustified. The Court's refusal to review fully the Board's action so subverts the proper function of a federal court in reviewing administrative action as to require a supervisory review by this Court. On this ground, too, the writ of certiorari should issue.

Conclusion.

The writ of certiorari should issue.

Respectfully submitted,

LAWRENCE J. McKAY,
80 Pine Street
New York 5, New York.
Attorney for Petitioner.

Of Counsel:

CAHILL, GORDON, REINDEL & OHL
ARTHUR MERMIN
RAYMOND L. FALES, JR.

November 23, 1960.

APPENDICES

	PAGE
APPENDIX A, First Report of the Board	1a-12a
APPENDIX B, Opinion of Court of Appeals for the Second Circuit Dated February 13, 1959	13a-16a
APPENDIX C, Supplementary Report of the Board	17a-34a
APPENDIX D, Opinion of Court of Appeals for the Second Circuit Dated July 13, 1960 and Dissenting Opinion of Judge Moore	35a-52a
APPENDIX E, Order of the Court of Appeals for the Second Circuit Denying Petition for Rehearing	53a
APPENDIX F, Statutes Involved	55a

APPENDIX A

[1]

First Report of the Board.

(1) FEDERAL MARITIME BOARD

No. 771

BANANA DISTRIBUTORS, INC.

v.

GRACE LINE INC.

No. 775

ARTHUR SCHWARTZ

v.

GRACE LINE INC.

Submitted November 19, 1956 Decided April 29, 1957

Respondent found to be a common carrier of bananas between Ecuador and United States Atlantic ports.

Respondent's contracting all of its refrigerated space to three shippers to the exclusion of complainants and their supporting interveners, found to be unjustly discriminatory in violation of sections 14 and 16 of the Shipping Act, 1916.

The institution, by Respondent, of forward-booking arrangements of two year periods, under which Respondent's refrigerated space would be equitably prorated among existing shippers, complainants and their supporting interveners, would be consistent with common carriage and not unjustly discriminatory in violation of sections 14 and 16 of the Shipping Act, 1916.

[2]

First Report of the Board.

MARVIN J. COLES, FRANCIS B. GOERTNER, and RICHARD W. KURRUS for Banana Distributors, Inc., and JOHN J. O'CONNOR, JR., and JOHN J. FOLEY for Arthur Schwartz.

JOHN H. HANRAHAN, JR., JOHN J. MCELHINNY, and FRANCIS A. WADE for Stanley Grayson, ROBERT F. MARTIN for Robert Martin Associates, MAURICE FINKELSTEIN, THOMAS J. BEDDOW, and DOUGLASS HUNT for Irving B. Joselow and Compania Frutera Sud Americana (Ecuador) S. A., and GEORGE F. GALLAND and WILLIAM J. LIPPMAN for Philip R. Consolo.

LAWRENCE J. MCKAY, ARTHUR MERMIN, and JAMES E. GREELEY for Grace Line Inc.

ROBERT BLACKWELL as Public Counsel.

(2) REPORT OF THE BOARD

(CLARENCE G. MORSE, Chairman, BEN H. GUILL, Vice Chairman, THOS. E. STAKEN, JR., Member)

These two cases arise out of complaints filed by Banana Distributors, Inc. ("Banana Distributors"), and Arthur Schwartz ("Schwartz") alleging that Grace Line Inc. ("Grace"), a common carrier by water between Ecuador and Atlantic Coast ports, refused to carry complainants' bananas in its refrigerated ("reefer") space in violation of sections 14, 15 and 16 of the Shipping Act, 1916 ("the Act") and of sections 1 and 2 of the Sherman Antitrust Act ("the Sherman Act").[1] The complaint in No. 775 contained substantially similar allegations.

Schwartz, complainant in No. 775, and Stanley Grayson ("Grayson"), intervened in No. 771. Banana Distributors,

[1] Complainant, in Docket No. 771, abandoned the Sherman Act allegations in its brief.

complainant in No. 771, intervened in 775. Irving B. Joselow ("Joselow"), Compania Frutera Sud Americana (Ecuador) S. A., ("Frutera"), Philip R. Consolo ("Consolo"), Robert Martin Associates ("Martin") and Public Counsel intervened in both proceedings. Grayson and Martin substantially supported the contentions of complainants whereas Joselow and Frutera supported the position of Grace. Consolo intervened only as his interests appeared.

The cases were consolidated for hearing before an examiner who served his recommended decision on June 1, 1956. Exceptions to this decision were filed by Grace, Joselow, Frutera and Consolo. Replies to the exceptions were filed by complainants and Public Counsel and the matters were argued orally before the Board.

The Board is in general agreement with the examiner. Exceptions taken and recommended findings not discussed in this report have been given consideration and have been found either not related to material issues or not supported by the evidence.

(3) Complainants ask the Board to (1) declare the contract between Grace and the existing banana shippers in this trade contrary to law and void, (2) direct Grace to desist from further carrying out the illegal contracts, (3) require Grace to allot reefer space to complainants in an amount deemed fair and reasonable by the Board, and (4) award other relief which the Board deems proper.[2]

Grace opposes these demands contending that (1) it is a contract carrier of bananas in this trade, and therefore its banana operations are not subject to the Act and (2) the Board is without jurisdiction to determine the validity of its banana contracts in the light of the Sherman Act.

---

[2] Although reparations were demanded, all parties agreed to defer this question.

[4]

First Report of the Board.

THE FACTS.

Respondent is the only U. S. flag operator offering a common carrier berth service on Trade Route No. 2, and is a party to an operating-differential subsidy agreement with the Federal Maritime Board covering this service. In this service, Grace operates three freighters with approximately fortnightly sailings and six combination passenger-cargo vessels with weekly sailings, all of which vessels have reefer facilities. United Fruit Company and Standard Fruit Company have vessels plying this trade route, but they carry bananas as exclusively proprietary cargo. Grancolombiana Line and the Chilean Line, both foreign flag operators, operate berth line vessels with reefer space in this trade, but the Grancolombiana Line calls at Philadelphia before New York City and due to infrequent or irregular service the Chilean Line is not a satisfactory banana carrier.

All of the bananas carried from Ecuador to New York since the inception of its reefer service on Trade Route No. 2 in 1934 have been by contract, and bananas constitute the only product carried by Grace on a contract carrier basis. Every other commodity carried by respondent on this trade route is carried as common carriage.

(4) At present, three shippers[3] utilize all of Grace's reefer space under two-year contracts and it is understood that the contracts are renewable, at the option, however, of the carrier.

Each shipper has exclusive use and control of individual compartments. The shipper loads the vessel at Guayaquil, Ecuador, at his own risk and expense and unloading is performed by Grace at the risk of and for the account of the shipper. Grace follows the shipper's temperature control instructions en route. Except in rare instances all shippers have requested that their bananas be transported at the same temperature.

---

[3] Joselow, Frutera, and Consólo.

Loading of bananas at Guayaquil is difficult. Port limitations necessitate loading off-shore from barges. The vessel is available for loading at Guayaquil for about 12 hours only. Each shipper moves his bananas shipside by barge where gangways are erected into side ports and loading is accomplished manually. When one shipper completes his loading and stowing another shipper draws his barges alongside and the entire operation is repeated.

Growing, shipping, and marketing of bananas, due to the nature of the commodity itself, requires a carefully synchronized operation. Bananas grow rapidly, and once cut from the plants are subject to rapid ripening. A shipper requires an assured amount of space in order to properly integrate his entire operation. There are no shore-side refrigerated warehouses in Guayaquil, and refrigeration does not prevent the normal ripening process. Shippers rigidly inspect bananas prior to their loading and stowing in order to prevent the shipment of overripe or Sikatoga-diseased bananas since such bananas could adversely affect otherwise "healthy" bananas. Each shipper strives to have his fruit reach their destination as green as possible.

(5) On this trade route Grace carries Chilean fruit northbound during the Chilean fruit season in its reefer space thereby reducing the space otherwise available for bananas. There is no commingling of Chilean fruit with bananas due, in part, to the difference in temperature requirements between the Chilean fruit and bananas. The Chilean fruit, although carried under terms of common carriage, is carried subject to "special arrangements" with the shippers.

Banana Distributors is an experienced importer and distributor of bananas. At present, this complainant imports a substantial quantity of bananas from Panama and, as the New York agent for Consolo, distributes Ecuadorian bananas. This complainant has requested reefer space of Grace since 1953, and each request has been positively denied. Schwartz has been connected with the banana business since 1928 and his business reputation is good. He has

requested space since 1946 and his requests have been denied. Grace offered Schwartz reefer space on the cargo vessels but because these vessels could offer a fortnightly service only, he refused it. Although Schwartz has had financial difficulties there is no evidence that Respondent denied him space for this reason.

Grayson has been in this business since 1942 and has had considerable experience importing bananas. At present not an importer, he is associated with others in a wholesale banana business in New York. Although he cannot finance a banana operation from Ecuador himself, he can obtain the necessary backing if he can secure space. He has requested reefer space from the Respondent since 1945 to no avail.

Martin has had limited experience in the banana trade, but is presently associated with others in a proposed banana importing project. One of his associates has had experience importing bananas from Ecuador. Grace has refused Martin reefer space since 1954. However, this intervener apparently has sufficient financial backing to engage in this trade and has agreed to post a performance bond with Grace.

(6) Findings and Recommendations of the Examiner

The examiner concluded upon the record that (1) Grace is a common carrier of bananas in this trade, and (2) the denial of reefer space to complainants and supporting interveners results in unjust discrimination in violation of sections 14 and 16 of the Act.

He recommended that (1) the Board order Grace to cancel its existing contracts with the three banana shippers in this trade, (2) the Board ordered Grace to prorate its reefer space on a fair and reasonable basis among existing shippers, complainants and interveners under two year forward booking arrangements; and (3) the Board hold the record open for a certain period in which Grace might accomplish these directives.

The examiner also recommended that in view of his finding that Grace's operations in the premises resulted in violations of sections 14 and 16 of the Act, it was unnecessary to make any findings respecting possible violations of the Sherman Act. No findings as to any violations of section 15 of the Act were made inasmuch as agreements between carriers and shippers—the contracts or agreements here—do not fall within the purview of this section.[4]

EXCEPTIONS

Respondent excepted to the findings and conclusions of the examiner contending that (1) it is a contract carrier of bananas in this trade, (2) its exclusion of complainants and others from participation in its reefer space was not in violation of sections 14 and 16 of the Act, and (3) the recommendation that a two year (7) forward booking arrangement be adopted in the banana trade is not common carriage but is a form of contract carriage and at any rate would be unworkable. The exceptions of Joselow, Frutera and Consolo present no issues not raised by Grace.

Complainants, their supporting interveners, and Public Counsel urged the adoption by the Board of the recommended decision.

DISCUSSION AND CONCLUSIONS

It is acknowledged that banana shippers have made substantial investments in their trade, that the entire operation, from grower in Ecuador to retailer in the United States, requires careful coordination, that bananas ripen rapidly, that care in shipment is essential, that the fruit is

[4] Complainant in Docket No. 771, alleged that Grace, as a member of the steamship conference covering this trade, under an agreement approved by the Board (FMB Agreement No. 3302), operated contrary to the terms of the conference agreements and hence in violation of section 15. However, complainants did not pursue this argument in its brief and since neither the conference nor the members thereof were parties to these proceedings, no determination of the issue is here made.

highly perishable, and that loading is difficult and must be accomplished within a relatively short time. On the other hand, the record clearly indicates that bananas are readily available to newcomers to the trade, that bananas from different plantations have been successfully mixed in a single compartment, that all exporters carefully inspect the fruit before loading and that carrying temperatures seldom vary. No doubt loading and stowing difficulties will increase as the number of shippers increase, but this factor is present in every trade and is no excuse for the carrier discriminating against some shippers in favor of a few.

On the whole, this record supports the conclusion that bananas are susceptible to common carriage, and it follows that Respondent, a common carrier of general cargo, has carried under contract a commodity which is capable of being and should have been, carried under terms of common carriage.

The so-called specialty cases relied upon by Grace as authority to except bananas from common carriage are not sufficient to bring this commodity into that class. Indeed, the cases most prominently urged upon the Board in support of Respondent's contention, the (8) *Express Cases*, 117 U. S. 1,601 (1886) and the *Voight*[5] case, are completely inapplicable: they deal with the question whether a common carrier obligation is owned by one common carrier to another common carrier who is a shipper, and in each case, the Court indicated that a different result might have been reached had a normal shipper-carrier relationship been presented. For example, in the *Express Cases*, at page 28, the Court said:

> "If the general public were complaining because the railroad companies refused to carry express matter themselves on their passenger trains, or to allow it to be carried by others, different questions would be presented."

---

[5] *Baltimore and Ohio S. Ry. Co. v. United States*, 126 U. S. 498 (1900).

Further, none of the specialty cases cited by Respondent indicates that a common carrier could, in carrying the specialty under contract, unjustly discriminate against other shippers similarly situated. In *United States* v. *Contract Steel Carriers, Inc.*, 350 U. S. 409 (1956), the Supreme Court upheld the contention of a duly licensed contract carrier that he was not operating as a common carrier where he confined his services to the specialty set forth in his license although his operation contained many of the attributes of common carriage. Here, however, we are concerned with the duties and obligations owed by a common carrier to a shipping public rather than those owed by a contract carrier. The Board agrees with the examiner that the specialty cases are inapplicable.

Other than the specialty cases involving common carrier-common carrier relationships, *supra*, the specialty cases cited by Respondent involve commodities which, by their very nature, are not capable of being carried under these terms of common carriage,[8] and since they dealt with the question of liability they do not stand for the proposition that other shippers similarly situated could legally be (9) denied space. It is therefore unnecessary for us to examine the authorities which say that a common carrier may at the same time and with the same facility be both a common carrier and contract carrier.

We next inquire into whether Respondent excluded complainants and their supporting interveners from participation in Respondent's reefer space in violation of sections 14 and 16 of the Act. As set forth above, the record discloses no convincing reason why any of these parties were

---

[8] *Dickenson* v. *Great Northern Ry. Co.*, 18 Q. B. D. 176 (1886), (Dogs); *Honeyman* v. *Oregon & C. R. Co.*, 13 Ore. 352 (1886), (Dogs); *Farmers and Mechanics Bank* v. *Champlain Transportation Co.*, 16 Vt. 52 (1844), (Bank bills); *Cleveland, C. C. & St. L. Ry.* v. *Henry*, 170 Ind. 94 (1908), (Circus cars); *Roberts* v. *Chicago & R. I. R. R. Co.*, 99 F. Supp. 895 (1951), (Pullman cars); *U. S.* v. *Louisville and Nashville R. R. Co.*, 221 F. 2d 698 (1955), (Silver).

denied space. We must assume, in view of the voluminous record, that had there existed valid reasons for Grace, as a common carrier, to deny these applicants space they would have been presented and that in the absence of such reasons, we must conclude, as did the examiner, that the complainants and interveners were qualified banana shippers. Having demanded space and having been refused such space by Respondent, it is not necessary that complainants and interveners prove that they actually tendered bananas for shipment. Such tendering, under the circumstances, would have been futile and idle, and legally unnecessary. *Philip R. Consolo* v. *Grace Line Inc.*, 4 FMB 293 (1953), citing *Atlantic Coast Line* v. *Geraty*, 166 Fed. 10. Therefore, on the basis of this record, we find that Respondent's refusal to carry bananas for complainants and interveners constituted a violation of sections 14 and 16 of the Act.

It is obvious that Respondent cannot satisfy all the reefer space desires of its present shippers and those of complainants and their supporting interveners and thus arises the problem of providing a plan, consistent with common carriage, of allocating space to qualified banana shippers.

(10) First, where the demand for space exceeds the supply the law is clear; a common carrier must equitably prorate its available space among shippers. *Penna R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121. *Patrick Lumber Co.* v. *Calmar S. S. Corp.*, 2 U. S. M. C. 494.

Equitable proration of space alone, however, in view of the economic factors inherent in this trade, is not a panacea. And it was with these economic factors in mind, that the examiner recommended the adoption of a forward booking arrangement.

Grace argues that the recommendation of a forward booking system is an admission that bananas do constitute a specialty. We need go no further than Respondent's own operation on this very trade route to dispose of the

argument that forward booking justifies the finding of a specialty: during the Chilean fruit season Grace, as a common carrier, transports this fruit under forward booking arrangements and when the fruit offered exceeds the available space, Grace prorates the space among the shippers.

Grace further contends that there is no justification in law for a forward booking system of the character and duration recommended.

Forward booking is not new to common carriage. *Ocean S. S. Co.* v. *Savannah Locomotive Works & Supply Co.*, 63 S. E. 577. It is then the duration of the system with which we must be concerned. We are mindful that once the system is initiated qualified applicants for space would be foreclosed from any proration in the space until the end of any given period. Although this is not a desirable result, in view of the economic problems presented here, we believe that the two year duration can be characterized as "reasonable" and is a system, compatible with common carriage, which affords existing importers the protection they require while providing a reasonable opportunity for prospective shippers to engage in the trade.

(11) Grace contends that the commingling of different shipper's bananas in the same compartment might result in increased damage claims based upon the arrival of spoiled fruit. Although we recognize that the intermingling of ripe and Sikatoga diseased bananas might adversely affect otherwise healthy bananas, in view of the facts of record that (1) good quality bananas are plentiful in Ecuador, (2) only Gross-Michel bananas are exported from Ecuador, (3) all such bananas move at the same carrying temperature, (4) all shippers rigidly inspect their fruit prior to loading, and (5) shippers desire to get their bananas to their destination in as green a condition as possible, coupled with the absence of any evidence tending to indicate that complainants and their supporting interveners would operate differently from Grace's present shippers, we believe that the possibility of damage is seemingly remote. We also

[12]

recognize that other perishable fruits and vegetables are commingled in cooled or refrigerated spaces. We conclude that applicants and their supporting interveners should not be excluded from participation in Grace's reefer space in this trade. We will leave to the parties the making of any necessary and practical arrangements designed to minimize or eliminate the commingling of bananas of several shippers.

In view of the foregoing, the Board adopts the examiner's recommendation that Grace prorate its reefer space, upon a fair and reasonable basis, among existing shippers, complainants and their supporting interveners under forward booking arrangements of two years. To this end Grace shall cancel its existing contracts with three banana shippers and offer reefer space, upon reasonable notice, fairly and equitably under two year forward booking arrangements, to all qualified shippers.

(12) Grace may require prospective shippers in this trade to post a bond covering the space assigned and may otherwise establish reasonable rules covering dead freight, inspection, and loading and stowing which prospective shippers must meet in order to qualify as users of space.

At the end of any forward booking period, in the event that additional qualified importers desire reefer space, it will be incumbent upon Respondent to reallocate space to existing importers and the new applicants upon a fair and reasonable basis.

No order will be entered at this time. Within 30 days after the serving of this Report, complainants shall submit an appropriate order, on matters other than reparation, for our approval, after 7 days' advance service upon Respondent. Hearing, if required, on the question of reparations will be set by the examiner.

By the Board.

JAMES L. PIMPER
Secretary

APPENDIX B

Opinion of Court of Appeals for the Second Circuit Dated February 13, 1959.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 97—October Term, 1958.

(Argued December 5, 1958 Decided February 13, 1959.)

Docket No. 24872

GRACE LINE, INC.,

Petitioner,

—v.—

FEDERAL MARITIME BOARD,

Respondent.

Before:

SWAN, MEDINA and WATERMAN,

Circuit Judges.

Petition to set aside an order of the Federal Maritime Board directing petitioner to cease and desist from further violating 46 U. S. C. §§812, 815. Reversed and remanded.

CAHILL, GORDON, REINDEL & OHL (LAWRENCE J. MCKAY, ARTHUR MERMIN, of counsel), New York City, for Petitioner.

VICTOR R. HANSEN, Asst. Atty. General; DANIEL M. FRIEDMAN, Atty., Dept. of Justice; E. ROBERT SEAVER, General Counsel; ROBERT E. MITCHELL, Asst. General Counsel; EDWARD APTAKER, Chief, Regulation Branch; ROBERT J. BLACKWELL, Atty., Federal Maritime Board, Washington, D. C., for Respondent.

Opinion of Court of Appeals for the Second Circuit Dated February 13, 1959.

WATERMAN, *Circuit Judge:*

Grace Line, Inc., petitioner herein, seeks to set aside an order of the Federal Maritime Board dated August 20, 1957. The Board finds petitioner to be a common carrier of bananas, and therefore to be in violation of sections 14 and 16 of the Shipping Act of 1916, 46 U. S. C. §§812, 815,[1] because it has contract carrying arrangements with certain shippers of that commodity. Petitioner is ordered, in place of such contract arrangements, to offer banana carriage to all qualified shippers, with successful applicants for carriage space to be determined on a fair and reasonable basis.

Petitioner is a United States flag operator offering common carrier service to and from ports in Ecuador from and to ports on the Atlantic coast of the United States. Since 1934, after extensive alteration of its vessels so as

---

[1] The pertinent portions of Sections 812 and 815 read as follows:

§812. Rebates and discriminations by carriers by water prohibited; • • •

No common carrier by water shall, directly or indirectly

• • • • • •

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; • • •

§815 Discriminatory acts prohibited

It shall be unlawful for any common carrier by water. • • •

• • • • • •

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

to add "reefer" (refrigerated) space, it has been carrying bananas on that route on a "contract carrier" basis. United Fruit Company and Standard Fruit Company have vessels plying this trade route, but they carry bananas as proprietary cargo. Grancolombiana Line and the Chilean Line, both foreign flag operators traveling this route, also have vessels with reefer space adequate for carrying bananas, but due to their schedules they are not suitable banana carriers. Bananas are the only product carried by petitioner on a contract carrier basis, every other commodity carried by it on this trade route being carried in common carriage.

This case arose out of complaints filed by Banana Distributors, Inc. and Arthur Schwartz alleging that petitioner was a common carrier by water, and that it had violated sections 14 and 16 by refusing to carry complainants' bananas in its reefer space. Various parties intervened, for and against Grace Line, and, after a hearing by an examiner and argument before the Board, the Board's Report[2] and the Order here in question were issued. The basis of the Board's decision seems to be that since bananas are "susceptible to common carriage"[3] petitioner is a common carrier thereof, and that therefore it violated sections 14 and 16 because it carried as a contract carrier a commodity which should have been carried under terms of common carriage. Petitioner maintains that it is a contract rather than a common carrier of bananas, that as such it is not within the proscriptions of sections 14 and 16, and that upon review by us of the action of the Board its Order should be set aside.

---

[2] Numbers 771 and 775, decided April 29, 1957.

[3] The rationale of the Board's decision reads as follows:

> On the whole, this record supports the conclusion that bananas are susceptible to common carriage; and it follows that Respondent, a common carrier of general cargo, has carried under contract a commodity which is capable of being and should have been, carried under terms of common carriage.

Opinion of Court of Appeals for the Second Circuit Dated February 13, 1959.

With respect to the scope of judicial review of administrative decisions, the cases are in agreement that there are minimal standards beyond which the courts cannot allow administrative bodies to go. The reviewing court must satisfy itself that the administrative decision has a "rational" or "reasonable" foundation in law, *SEC* v. *Chenery Corp.*, 332 U. S. 194, 207 (1947), *rehearing denied* 332 U. S. 747 (1947); *Unemployment Compensation Commission* v. *Aregan*, 329 U. S. 143, 154 (1946); *NLRB* v. *Hearst Publications*, 322 U. S. 111, 131 (1944), *rehearing denied* 322 U. S. 769 (1944); *Gray* v. *Powell*, 314 U. S. 402, 411 (1941); *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 146 (1939); and when not so satisfied the court must reverse the administrative action, *Social Security Board* v. *Nierotko*, 327 U. S. 358 (1946). The Board reasoned that since bananas are susceptible of common carriage petitioner could not transport them otherwise than in common carriage. Such a test, a test based upon susceptibility only, tends, in effect, to eliminate contract carriage. Most, if not all, commodities are "susceptible" of common carriage. This susceptibility test would appear to be clearly contrary to the Congressional purpose, for it is obvious that Congress intended that section 14 and 16 should apply not to all carriers but only to "common" carriers by water.

Upon this appeal the Board would seek to support its Report by arguing that in view of sections 14 and 16 an ocean carrier which transports commodities for the public generally cannot as part of its regular business carry also a particular commodity on a contract basis. But we cannot now decide whether this new argument suffices to support the Report and Order now before us. We must judge the propriety of the Board's action solely on the grounds then invoked by it. *SEC* v. *Chenery Corp.*, 318 U. S. 80, 87, 88 (1942); 332 U. S. 194, 196 (1947), *rehearing denied* 332 U. S. 747 (1947).

Reversed and remanded.

APPENDIX C

Supplementary Report of the Board.

FEDERAL MARITIME BOARD

No. 771

BANANA DISTRIBUTORS, INC.

v.

GRACE LINE INC.

No. 775

ARTHUR SCHWARTZ

v.

GRACE LINE INC.

Decided May 4, 1959

Respondent, in the operation of freighters and combination vessels between ports on the west coast of South America and U. S. Atlantic ports, found to be a common carrier by water, and therefore subject to the provisions of the Shipping Act, 1916.

Respondent's practice of contracting all of its refrigerated space on these vessels to three shippers to the exclusion of other qualified shippers, found to be unjustly discriminatory in violation of section 14 Fourth of the Shipping Act, 1916 and found to be unduly and unreasonably prejudicial and disadvantageous in violation of section 16 First of the Shipping Act, 1916.

Supplementary Report of the Board.

Forward-booking arrangements of two year periods, entered into pursuant to just and reasonable regulations and practices relating to the receiving, handling, stowing, transporting and discharging of bananas, under which respondent's refrigerated space would be equitably prorated among qualified banana shippers, found to be not unjustly discriminatory in violation of sections 14 and 16 of the Shipping Act, 1916.

MARVIN J. COLES, FRANCIS B. GOERTNER, and RICHARD W. KURRUS for Banana Distributors, Inc.

JOHN J. O'CONNOR, JR. and JOHN J. FOLEY for Arthur Schwartz.

JOHN H. HANRAHAN, JR., JOHN J. MCELHINNY, and FRANCIS A. WADE for Stanley Grayson, intervener.

ROBERT F. MARTIN for Robert Martin Associates, intervener.

MAURICE FINKELSTEIN, THOMAS J. BEDDOW and DOUGLASS HUNT for Irving B. Josslow and Compania Frutera Sud Americana (Ecuador) S. A., interveners.

GEORGE F. GALLAND and WILLIAM J. LIPPMAN for Philip R. Consolo, intervener.

LAWRENCE J. MCKAY, ARTHUR MERMIN, and JAMES E. GELEEY for Grace Line Inc.

ROBERT J. BLACKWELL as Public Counsel.

SUPPLEMENTARY REPORT OF THE BOARD

(Clarence G. Morse, Chairman; Ben H. Guill, Vice Chairman; Thos. E. Stakem, Jr., Member)

By the Board:

As noted in our earlier report, these two cases, consolidated for hearing, arose out of complaints filed by

Banana Distributors, Inc. ("Banana Distributors"), and Arthur Schwartz ("Schwartz") alleging that Grace Line Inc. ("Grace") a common carrier by water between Ecuador and U. S. Atlantic coast ports, refused to carry complainant's bananas in its refrigerated ("reefer") space, in violation of sections 14, 15 and 16 of the Shipping Act, 1916 ("the Act"), and of sections 1 and 2 of the Sherman Antitrust Act ("the Sherman Act").[1]

Schwartz and Stanley Grayson ("Grayson") intervened in No. 771; Banana Distributors intervened in 775; Irving B. Joselow ("Joselow"), Compañia Frutera Sud Americana (Ecuador) S. A. ("Frutera") Philip R. Consolo ("Consolo"), Robert Martin Associates ("Martin"), and Public Counsel intervened in both proceedings. Grayson and Martin substantially supported the contentions of complainant, whereas Joselow and Frutera supported the position of Grace. Consolo intervened only as his interests appeared.

Complainants asked the Board to (1) declare the contract between Grace and the existing banana shippers in this trade contrary to law and void, (2) direct Grace to desist from further carrying out the illegal contracts, (3) require Grace to allot reefer space to complainants in an amount deemed fair and reasonable by the Board, and (4) award other relief which the Board deems proper.[2]

In his recommended decision of June 1, 1956, the examiner concluded that (1) Grace is a common carrier of bananas in the trade, (2) the denial of reefer space to complainants and their supporting intervenors resulted in violations of sections 14 and 16 of the Act, and recommended that Grace prorate its reefer space on a fair and reasonable basis among existing shippers, complainants, and inter-

[1] Allegations of violation of the Sherman Act were abandoned by complainant in No. 771.

[2] Although reparations were demanded, all parties agreed to defer this question.

veners under two-year forward booking arrangements. Exceptions to this decision were filed by Grace, Joselow, Frutera, and Consolo. Replies to the exceptions were filed by complainants and Public Counsel, and the matters were argued before the Board.

Respondent excepted to the findings and conclusions of the examiner, contending that (1) it is a contract carrier of bananas in this trade, (2) its exclusion of complainants and others from participation in its reefer space was not in violation of sections 14 and 16 of the Act, and (3) a 2-year forward-booking arrangement in the banana trade is not common carriage but is a form of contract carriage and at any rate would be unworkable. The exceptions of Joselow, Frutera, and Consolo present no issues not raised by Grace.

In our first report herein, served on April 30, 1957, and our order, entered on August 19, 1957, we concluded that bananas are susceptible to common carriage, and that Grace, as a common carrier, should have carried the bananas under terms of common carriage. Grace was ordered, *inter alia*, to cease and desist from entering into or carrying out contracts with banana shippers in violations of sections 14 and 16 of the Act, to equitably prorate its reefer space to all qualified banana shippers under terms of forward bookings for periods not to exceed two years, to employ uniform, fair, and reasonable standards in determining the qualifications of prospective banana shippers, and to establish and enforce just and reasonable regulations and practices relating to the receiving, handling, stowing, transporting, carrying, and discharging of bananas on its common carrier vessels.

Subsequently, that report and order were reviewed by the United States Court of Appeals for the Second Circuit, which court vacated our order and remanded the proceeding to us, specifically rejecting our sole reliance on what the Court called the "susceptibility test":

> "This susceptibility test would appear to be clearly contrary to the Congressional purpose, for

it is obvious that Congress intended that sections 14 and 16 should apply not to all carriers but only to 'common' carriers by water." *Grace Line Inc. v. Federal Maritime Board*, 263 F. 2d 709 (1959).

We have since reviewed the matter in the light of the court's decision and, upon further consideration without arguments or hearings, arrive at the same conclusion without reference to the susceptibility test.

The Facts.

Respondent is the only U. S. flag operator offering a common carrier berth service on Trade Route No. 2, which encompasses U. S. Atlantic ports and ports on the west coast of South America, and receives operating differential subsidy aid for its service on the route. Grace is also a member of the Association of West Coast Steamship Companies, a conference of common carriers approved by the Board pursuant to section 15 of the Act, and carries over 150 different commodities northbound in this trade as a common carrier.

In this service, at the time of hearing Grace operated three freighters with approximately fortnightly sailings, and six combination passenger-cargo vessels with weekly sailings, all of which vessels have reefer facilities. United Fruit Company and Standard Fruit Company have vessels plying this trade route but they carry bananas as exclusively proprietary cargo. Grancolombiana Line and Chilean Line, both foreign-flag operators, operate berth line vessels with reefer space in this trade, but Grancolombiana calls at Philadelphia before New York City, and due to infrequent or irregular service the Chilean Line is not a satisfactory banana carrier.

All of the bananas carried by Grace from Ecuador to New York since the inception of its reefer service on Trade Route No. 2 in 1934 have been by special contract, and bananas are the only product carried on a contract basis;

every other commodity is carried by Grace in its capacity as a common carrier.

At the time of the hearing, three shippers[3] utilized all of Grace's reefer space under two-year contracts, which contracts were renewable at the option of the carrier.

Each shipper had exclusive use and control of individual compartments. The shipper loaded the vessel at Guayaquil, Ecuador, at his own risk and expense, and unloading was performed by Grace at the risk, and for the account, of the shipper. Grace followed the shipper's temperature control instructions en route. Except in rare instances, all shippers requested that their bananas be transported at the same temperature.

Loading of bananas at Guayaquil is difficult. Port limitations necessitate loading offshore from barges and the vessel is available for loading at Guayaquil for about 12 hours only. Each shipper moves his bananas shipside by barge, where gangways are erected into side ports and loading is accomplished manually. When one shipper completes his loading and stowing another shipper draws his barges alongside and the entire operation is repeated.

Growing, shipping, and marketing of bananas, due to the nature of the commodity itself, requires a carefully synchronized operation. Bananas grow quickly, and once cut from the plants are subject to rapid ripening. A shipper requires an assured amount of space in order to integrate his entire operation properly. There are no shoreside refrigerated warehouses in Guayaquil; and refrigeration does not prevent the normal ripening process. Shippers rigidly inspect bananas prior to their loading and stowing in order to prevent the shipment of overripe or sigatoka-diseased bananas, since they could adversely affect otherwise "healthy" bananas. Each shipper strives to have his fruit reach destination as green as possible.

[3] Joselow, Frutera, and Consolo.

Supplementary Report of the Board.

On this trade route Grace carries Chilean fruit northbound in its reefer space during the Chilean fruit season, thereby reducing the space otherwise available for bananas. There is no commingling of Chilean fruit with bananas due, in part, to the difference in temperature requirements between the Chilean fruit and bananas. The Chilean fruit, although carried pursuant to "special arrangements" with the shippers, is carried by Grace in its capacity as a common carrier.

Banana Distributors is an experienced importer and distributor of bananas. At the time of hearing, this complainant imported a substantial quantity of bananas from Panama and, as the New York agent for Consolo, distributed Ecuadorian bananas. This complainant had requested reefer space of Grace since 1953, but each request had been denied. Schwartz has been connected with the banana business since 1928 and his business reputation is good. He had requested space since 1946 but his requests had been denied. Grace offered Schwartz reefer space on the cargo vessels but because these vessels could offer a fortnightly service only, he refused it. Although Schwartz has had financial difficulties there is no evidence that respondent denied him space for that reason.

Grayson has been in this business since 1942 and has had considerable experience importing bananas. At the time of hearing he was not an importer but was associated with others in a wholesale banana business in New York. Although he himself could not finance a banana operation from Ecuador, the record establishes that he could obtain the necessary financial backing. He requested reefer space from respondent since 1945, to no avail.

Martin has had limited experience in the banana trade, but at the time of hearing, was associated with others in a proposed banana importing project. One of his associates has had experience importing bananas from Ecuador. Grace has refused Martin reefer space since 1954. This intervener apparently has sufficient financial backing to engage in this trade and has agreed to post a performance bond with Grace.

Supplementary Report of the Board.

DISCUSSION AND CONCLUSION.

The ultimate question here is whether respondent can lawfully allocate all of its reefer space, on its vessels engaging in the trade between certain South American ports and U. S. Atlantic ports, to certain banana shippers to the exclusion of other qualified shippers of bananas.

Grace contends that it is not a common carrier of bananas because it has never held itself out to the shipping public as a common carrier of bananas, and therefore its activities with respect to its banana movement are not subject to the provisions of the Act. Moreover, respondent claims that bananas, because they require specialized handling, constitute a specialty which justifies their being carried by Grace under special contracts. Grace asserts that it may refuse bananas altogether or accept them on special terms for selected shippers without running afoul of the provisions of the Act.[4]

Our first inquiry relates to an inquiry of the scope of the Act, *i.e.*, whether respondent, in the operation of these vessels, falls within the purview of the Statute. Section 1 of the Act provides in part:

> "The term 'common carrier by water in foreign commerce' means a common carrier, except ferryboats running on regular routes, engaged in transportation by water of passengers or property between the United States . . . . and a foreign country . . . . *Provided* that a cargo boat commonly called an ocean tramp shall not be deemed such 'common carrier by water in foreign commerce'."

[4] We are not concerned with the question whether bananas are carried under a bill of lading or under some other form of transportation document, nor are we here concerned with the lawfulness of the terms of the document of carriage (Carriage of Goods by Sea Act, 1936, 46 U. S. C. 1300 *et seq.*). Our concern here is whether bananas must be carried under the provisions of the Shipping Act.

Thus the entity which constitutes a "common carrier by water in foreign commerce" is subject to the provisions of the Act and the jurisdiction of this Board. The term "common carrier" is not defined in the statute, but the legislative history of the Act indicates that the person to be regulated is the common carrier at common law. *Agreement No. 7620*, 2 U. S. M. C. 749 (1945). And at common law a common carrier is one who holds himself out to carry for hire the goods of those who choose to employ him. *Propeller Niagara* v. *Cordes*, 62 U. S. 7 (1858); *Railroad Company* v. *Lockwood*, 84 U. S. 357 (1873); *Liverpool and Great Western Steam Company* v. *Phenix Ins. Co.*, 129 U. S. 397 (1888). In the *Niagara* case *supra*, it was held:

> "A common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him from place to place. *He is, in general, bound to take the goods of all who offer*, unless his complement for the trip is full, or the goods be of such kind as to be liable to extraordinary danger, or such as he is unaccustomed to convey." (italics added).

Grace transports goods generally in this trade on these vessels. Bananas do not confront Grace with liability from extraordinary danger, and they constitute a commodity which respondent is most accustomed to convey. What is not a common carrier has likewise been defined judicially.

Generally, where the full reach of the vessel is let to a single shipper, there exists private carriage, a bailment for hire. *Lamb* v. *Parkman*, 14 Fed. Cas. 1019 (1857); *Sumner* v. *Caswell*, 20 Fed. 249 (1884); *The Wildenfels*, 161 Fed. 864 (1908).

In *Lamb* v. *Parkman*, *supra*, the court said at page 1023:

> "It is contended, in behalf of the respondent that the libellants were common carriers. By the charter party, the whole ship was let to the defendant, who

> was to furnish a full cargo, and the owners had no right to take goods for any other person. In no sense were they common carriers, but bailees to transport for hire, . . ."

Grace is admittedly a common carrier in this trade. The record emphasizes this. The vessels employed in carrying bananas for its chosen shippers are otherwise engaged in carrying general cargo for all who choose to employ them. We therefore find that respondent, in the operation of its freighter and combination vessels between certain South American ports and U. S. Atlantic ports, is a common carrier by water within the meaning of section 1 of the Act.

We next inquire whether a common carrier subject to the provisions of the Act may exempt itself, in part, from the provisions of the Act. Grace makes much of the fact that it has not held itself out as a common carrier of bananas, and argues that it has lawfully excepted bananas from its holding out, relying heavily upon the *Express Cases*, 117 U. S. 1, 601 (1886) to support its contention that it may legally exclude complainants and other banana shippers from sharing in its reefer space on vessels which operate as common carriers. In the *Express Cases*, the Supreme Court was called upon to decide whether a common carrier by rail could exclude an express company from using its facilities to conduct its own common carrier business:

> "The exact question is whether the express companies can now demand as a right what they have heretofore had only as a permission. That depends, it is conceded, on whether all railroad companies are now charged with the duty of carrying all express companies in the way that express carriers when taken are usually carried, just as they are with the duty of carrying all passengers and freight when offered in the way that passengers and freights are carried." (117 U. S. at 26).

The specificity of the scope of the question is further emphasized in the Court's opinion:

> "The question is not whether these railroad companies must furnish the general public with reasonable express facilities, but whether they must carry these particular express carriers for the purpose of enabling them to do an express business over the lines." (117 U. S. at 27).

Whether the railroads could refuse express matter from the general public was not an issue, and there is no inkling in that case that the railroads could refuse to carry express matter offered by some of the general public and accept it from others:

> "If the general public were complaining because the railroad companies refused to carry express matter themselves on their passenger trains, or to allow it to be carried by others, different questions would be presented." (117 U. S. at 28).

Of importance in the instant proceeding is the following:

> "So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done, the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security." (117 U. S. at 24, 25).

Similarly, in *Chicago Railroad Co.* v. *Pullman Car Co.*, 139 U. S. 79 (1891), where a contract between a railroad and the

Pullman Co. by which the railroad granted a sleeping car company the exclusive right to furnish all sleeping cars required by the railroad for a period of 15 years was assailed as contrary to public policy and in restraint of the trade, the Court said:

> "The defendant was under a duty arising from the public nature of its employment to furnish . . . such accommodations as were reasonably required . . . by the . . . passenger traffic. Its duty, as the carrier of passengers, was to make suitable provisions for their comfort and safety. Instead of furnishing its own . . . cars, as it might have done, it employed the plaintiff, whose special business was to provide cars of that character, to supply as many as were necessary to meet the requirements of travel. It thus used the instrumentality of another corporation in order that it might properly discharge its duty to the public. So long as the defendant's lines were supplied with the requisite number of drawing room and sleeping cars, it was a matter of indifference to the public who owned them." (139 U. S. at 89).

We believe the *Express Cases* afford respondent no comfort here. Grace is a common carrier and as such owes a duty to the shipping public to serve similarly situated shippers alike. Joselow, Frutera, and Consolo are not the instrumentalities of Grace whereby it discharges its common carrier obligations to the banana shipping public. Paraphrasing the *Express Cases*, Grace, in order to perform "its whole duty to the public at large and to each individual" must afford the public all reasonable reefer accommodations.

The Act confers jurisdiction over *carriers*, specifically over "common carriers" as distinguished from granting jurisdiction over types of *carriage*, i. e. common or contract, and the movement of any commodity by a common

carrier, regardless of the name the carrier uses in connection with it—or any part of it—must conform to the requirements of the Act, including its discriminatory injunctions, or be stricken down. We agree with Grace that a common carrier by water may except certain goods from its holding out to carry, but whatever Grace—a common carrier by water—carries, it carries subject to the provisions of this Act. To accept Grace's contentions here would result in a perversion of the will of the legislature as expressed in the Act. In excluding some qualified banana shippers from participation in its reefer space, Grace is derelict in the performance of its duty to the public.

Grace also relies on *United States* v. *Louisville & Nashville Railroad Co.*, 221 F. 2d 698 (1955) to support its position here. Although that case recites "[a] railroad company when acting outside the performance of its legal duties may contract as a private carrier . . ." considered in its proper perspective, it involves facts far different from the one presented here: the cargo consisted of reactors, a commodity never before carried by the railroads; these reactors were shipped by and for the Government—the only possible shipper thereof—during war time; the cars involved in the transportation had to be substantially modified to accommodate the reactors, and they had to be withdrawn from their regular service during the course of their special employment. That movement can hardly be equated with the transportation of bananas from Ecuador to the United States by a carrier regularly moving them, for several shippers, in substantial quantities (one of its prime revenue producing commodities in the northbound trade), over the course of a quarter century, in facilities (reefers) which are able to, and do, accommodate, all commodities requiring refrigeration. Properly analyzed the *Louisville* case is consonant with the rule in the *Niagara* case, *supra*, which requires a common carrier to accept the goods of all who offer "unless his complement for the trip is full, or the goods be of such kind as to be liable to extraordinary

danger, or such as he is unaccustomed to convey,"[5] which is particularly appropriate here, as Grace has long carried bananas and they do not present liability from extraordinary danger.

What we said in *Philip R. Consolo v. Grace Line Inc.*, 4 F. M. B. 293 (1953) is controlling here:

> "Respondent admits that it has undertaken to carry general cargo from Ecuador to the United States for all persons indifferently, and has for many years done so . . . We think this admitted fact is determinative of this proceeding and that, in spite of special arrangements of whatever sort, respondent may not lawfully assume the status of a contract carrier to any shipper on its common-carrier vessels, or grant to any shipper on such vessel special rates, special privileges, or other special advantages not accorded to all persons indifferently."

We now look to respondent's actions with respect to its banana carryings to determine whether they square with the prohibitions against discrimination in sections 14 Fourth[6] and 16[7] of the Act. Under section 14 Fourth a

---

[5] Not a single case cited by Grace supports the proposition that similarly situated *shippers* may be treated discriminatorily by a common carrier with respect to space accommodations.

[6] In pertinent part, section 14 of the Act provides:

> "That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—
>
> • • • • • •
>
> "Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or *unfairly treat or unjustly discriminate against* any shipper in the matter of (a) *cargo space accommodations or other facilities*, due regard being had for the proper loading of the vessels and the available tonnage . . ." (Italics added).

common carrier by water may not unjustly discriminate against any shipper in the matter of cargo space accommodations or other facilities, and under 16 First, such carrier may not give any undue or unreasonable preference to any particular person or subject any particular person to any undue or unreasonable prejudice or disadvantage. In summarily denying reefer accommodations to complainants and their supporting interveners, all of whom repeatedly requested such space, and in favoring Joselow, Frutera and Consolo with that space, respondent discriminated against the former and subjected them to prejudice and disadvantage with reference to cargo space. Similarly, Joselow, Frutera, and Consolo were preferred.

Whether respondent has violated sections 14 and 16, however, depends upon whether its prejudice and discrimination was undue and unreasonable. As noted above, complainants and their supporting interveners are experienced banana importers, and we find the existence of no lawful reason why Grace denied them space.

In our original report herein, we considered Grace's contention that bananas constitute a "specialty" and therefore not "susceptible" of common carriage. Grace contended that bananas of several shippers could not be commingled. We have found the facts on this point contrary to this contention of the respondent. As we stated in that report, there is nothing in the banana trade which prevents their being transported by respondent in its capacity as a common carrier, and therefore find no merit in this argument.

---

[7] Section 16 of the Act provides in part:

* * * * * * *

"That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Supplementary Report of the Board.

We are convinced that bananas of different shippers can be commingled in the same compartment. Although we recognize that the intermingling of ripe and sigatoka-diseased bananas might adversely affect otherwise healthy bananas, in view of the facts of record—(1) good quality bananas are plentiful in Ecuador, (2) only Gros Michel bananas are exported from Ecuador, (3) all such bananas move at the same carrying temperature, (4) all shippers rigidly inspect their fruit prior to loading, and (5) shippers desire to get their bananas to their destination in as green a condition as possible—coupled with the absence of any evidence tending to indicate that complainants and their supporting interveners would operate differently from Grace's present shippers, we believe that respondent's fear of commingling does not afford respondent a legal justification for its prejudicial and discriminatory treatment of otherwise qualified banana shippers. We also note that other perishable fruits and vegetables are commingled in cooled or refrigerated spaces.

It is acknowledged that banana shippers have made substantial investments in their trade, that the entire operation, from grower in Equador to retailer in the United States, requires careful coordination, that bananas ripen rapidly, that care in shipment is essential, that the fruit is highly perishable, and that loading is difficult and must be accomplished within a relatively short time. On the other hand, the record clearly indicates that bananas are readily available to newcomers to the trade, that bananas from different plantations have been successfully mixed in a single compartment, that all exporters carefully inspect the fruit before loading, and that carrying temperatures seldom vary. While it may be that loading and stowing difficulties will increase as the number of shippers increase, this factor is present in every trade and it is not an excuse for a common carrier discriminating against some shippers in favor of a few.

Since no valid reason has been forthcoming to justify the refusal of space to qualified shippers, and the preference

accorded the chosen shippers, we conclude that the discrimination was unjust in violation of section 14 First and that the prejudice and disadvantage was undue in violation of section 16 Fourth.

It is obvious that respondent cannot satisfy all the reefer space desires of its present shippers and those of complainants and their supporting interveners, and thus arises the problem of providing a plan of allocating space to qualified banana shippers.

First, where the demand for space exceeds the supply, the law is clear: a common carrier must equitably prorate its available space among shippers. *Penna. R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121 (1915); *Patrick Lumber Co.* v. *Calmar S. S. Corp.*, U. S. M. C. 494 (1941) Equitable prorations of space alone, however, in view of the economic factors inherent in this trade, is not a panacea. And it was with these economic factors in mind that the examiner recommended the adoption of a forward-booking arrangement.

Grace argues that the recommendations of a forward-booking system is an admission that bananas do constitute a specialty. We need go no further than respondent's own operation on this very trade route to dispose of the argument that forward booking justified the finding of a specialty; during the Chilean fruit season Grace, as a common carrier, transports this fruit under forward-booking arrangements, and when the fruit offered exceeds the available space, the space is prorated among the shippers.

Grace further contends that there is no justification in law for a forward-booking system of the character and duration recommended. Forward booking is not new to common carriage. *Ocean S. S. Co.* v. *Savannah Locomotive Works & Supply Co.*, 131 Ga. 831, 63 S. E. 577 (1909). It is, then, the duration of the system with which we must be concerned. We are mindful that once the system is initiated, qualified applicants for space would be foreclosed from any proration in the space until the end of

any given period. In view of the economic problems presented here we believe and find that the 2-year duration can be characterized as "just" and "reasonable" rather than "unjustly discriminatory" and "unreasonably prejudicial" and is a system which affords existing importers the protection they require while providing a reasonable opportunity for prospective shippers to engage in the trade.

Qualified banana shippers must not be excluded from participation in Grace's reefer space in this trade. However, as we stated in our earlier report, the making of any necessary and practical arrangements designed to minimize or eliminate commingling of bananas of several shippers shall be left to the parties involved. We here reaffirm our adoption of the examiner's recommendation that Grace prorate its reefer space, upon a fair and reasonable basis, among qualified banana shippers, under forward-booking arrangements of two years.

Grace may require prospective shippers in this trade to post a bond covering the space assigned, and may otherwise establish reasonable rules covering dead freight, inspection, and loading and stowing, which prospective shippers must meet in order to qualify as users of space.

At the end of any forward-booking period, in the event that additional qualified importers desire reefer space, it will be incumbent upon respondent to reallocate space to existing importers and the new applicants upon a fair and reasonable basis.

An appropriate order, consonant with this report, will be issued.

Although complainant in No. 771 alleged that respondent, as a member of the Association of West Coast Steamship Companies (F. M. B. Agreement No. 3302), has operated contrary to the terms of the conference agreement in violation of section 15 of the Act, the matter was not pursued and since neither the Conference nor the other members thereof were parties to the proceeding, no determination of the issue is made here.

JAMES L. PIMPER
Secretary

APPENDIX D

Opinion of Court of Appeals for the Second Circuit Dated July 13, 1960 and Dissenting Opinion of Judge Moore.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 229—October Term, 1959.

(Argued March 28, 1960 Decided July 13, 1960.)

Docket No. 25744

GRACE LINE, INC.,

Petitioner,

v.

FEDERAL MARITIME BOARD,

Respondent.

Before:

HAND, WATERMAN and MOORE,

Circuit Judges.

On petition by the Grace Line, Inc. to review an order of the Federal Maritime Board adjudging that the petitioner cease to perform certain contracts held to be in violation of §§812 and 815 of Title 46, of U. S. Code of the United States Shipping Act.

LAWRENCE J. McKAY, *for the petitioner.*

IRWIN A. SEIBEL, *for the respondent.*

HAND, *Circuit Judge*:

This case comes before us upon a petition of the Grace Line to review (§1032 of Title 5, U. S. Code), an order

of the Federal Maritime Board under the United States Shipping Act, §§812 and 815, Title 46, U. S. Code. The order was made by the Board after a hearing before one of its "Examiners," and the question is whether the Grace Line, which is concededly a "common carrier by water" of many kinds of goods in trade between South American countries and the United States violated §812 (Fourth), and §815 (First) of Title 46 of the United States Shipping Act by unjustly discriminating against shippers of bananas as to "cargo space accommodations," and by the "unreasonable preference" of three shippers of bananas which it accepted from Guayaquil, Ecuador, to New York. The position of the Grace Line is that, because it has always carried bananas on a "contract" basis, and has never "held itself out as a common carrier" of bananas, it has the privilege of allocating its cargo space, and confining its carriage, to those shippers that it prefers. The Board held that because the Grace Line was a "common carrier by water" within §§812 and 815, it might not evade those sections as to any part of the goods that it lifted, but must give all shippers of bananas equal access to its ships. We reversed a similar order in the same case (263 Fed. (2) 709) because the Board had based its holding only upon the fact that the bananas were "susceptible" of "common carriage" which we thought to be insufficient since all, or nearly all, goods are "susceptible" of "common carriage."

Bananas require a special kind of carriage. They must be laded in refrigerating compartments ("reefers") in which the temperature is kept within specified limits. No matter how cared for, they cannot be kept merchantable for more than three weeks after they have been cut, during which period their ripening continues although a "reefer" will somewhat delay it. Guayaquil has no means of refrigerating bananas while they await lading in a ship, which is done from barges brought alongside. For these reasons a shipper must know in advance upon what space and upon

what ship he can rely to lade and carry a specific consignment, for speedy dispatch to the ultimate consumer is an absolute condition of the business. The order of the Board specified certain conditions to which a shipper must conform in order to become entitled to "common carriage," but the sufficiency of these is not in dispute here. The Grace Line began the carriage of bananas in 1934, and has built up a very substantial business. Continuously from the outset all its banana carriage has been by "special contract" and has been limited to three shippers at a time, though one of these has been changed. It insists that since no carrier becomes a "common carrier" which does not "hold itself out" as such, and since it has never done this as to bananas, it is only a "contract carrier" as to them, and §§812 and 815 do not apply. Hence, it says, the sections gave the Board no jurisdiction to regulate its banana business. Four shippers of bananas have been denied any space in its "reefers" and intervened in the proceeding before the Board.

We accept the test that at common law a carrier becomes a "common carrier" only when it "holds itself out" as such, so that the issue at bar resolves itself into whether §§812 and 815 are to be construed to mean that a carrier which "holds itself out" as a common carrier of certain kinds of goods, is such only as to those goods and may carry by "special contract" any other kinds of goods it pleases. At common law there was no doubt, that a "common carrier" may on occasion carry by contract. For example, in the *Express Cases*, 117 U. S. 1, on which the Grace Line especially relies, the railroads were allowed to choose their own express companies for the carriage of goods sent by express. Again, in *United States* v. *Louisville & Nashville Railroad Co.*, 221 Fed. (2) 698 (C. A. 6), a railroad was allowed to fix its charge against the United States for the carriage of silver electrical equipment which the freight classification rules provided that it should not carry. However, for the reasons we shall give, we think that we need not

decide in what circumstances, if at all, a carrier ever becomes subject to a common law duty of equal treatment of shippers of goods as to which it has never specifically held itself out as "common carrier." For instance, we need not express any opinion whether the privilege of carrying by "contract" is limited to those situations in which there are no competing shippers for the space granted to a preferred shipper, or to the cargoes of chartered ships, or to what other situations, if any. *Arguendo*, we will assume that in the case at bar the Grace Line would be privileged at common law to select favorites from among banana shippers who were competing for cargo space in "reefers."

We may leave that question open because we think that §§812 and 815 should not be construed to give any "common carrier" the right to "unjustly discriminate against any shipper in the matter of (a) cargo space" (§812), or to "give any undue or unreasonable preference or advantage to any particular person" (§815). The Grace Line's argument presupposes, not only that these duties are limited to "common carriers by water," as of course they are, but also that they are limited to such carriers while they are carrying goods as to which they have "held themselves out as 'common carriers.'" We can see no reason to impute such a limitation upon the definition of "common carrier" in §801.

The respondent was organized as part of a policy of "encouraging, developing and creating • • • a merchant marine to meet the requirements of the commerce of the United States" (prologue to Chapter 451, Laws of 1916), and the Board, created in 1936, was given power to "investigate" any complaint setting forth any violation of Chapter 451 by "a common carrier by water" and to "make such order as it deems proper" (§821). That of course does limit the Board to the regulation of "common carriers," but we can see no reason for further limiting it to the conduct of

such carriers in areas in which they have "held themselves out" as "common." It may tend to impair the maintenance of a "merchant marine" to allow an indubitable "common carrier" to determine at its pleasure that as to some goods it will unjustly discriminate among its shippers by doing all it business with them on a "contract" basis. It may be, indeed it is true that we should not deal with such interests by generalizations; and that each case should be decided on its peculiar merits, but that is exactly what will be within the power of the Board, unless we add to the phrase "common carrier," the suffix, "while acting as such." There is no verbal necessity for doing this and there is every reason of declared policy to assume that the term was used to include all those who were to some degree "common carriers." Certainly the Board is prima facie better qualified than are courts (*Roberto Hernandez, Inc.* v. *Arthur Bernstein*, 116 Fed. (2) 849, 851 (C. A. 2)) to decide when, if at all, a transportation company, which has accepted the status of "common carrier" as to some of its activities, will prejudice the "developing of a merchant marine" by allowing access to its cargo space only to its favorites, instead of to all shippers who qualify for the kind of carriage involved.

No doubt it is relevant in a carrier's or the Board's decision that the goods require "special" carriage, as bananas do. Certainly the carrier is empowered to prescribe these requirements, save only that they be reasonable ones; and no shipper who cannot give assurance that he can, and will, conform to them need of course be considered. All that is here involved is that, if a shipper qualified, he may not be denied space at the pleasure, and for the profit, of the carrier. It appears to us that when Congress enacted authoritative supervision over the equal treatment of shippers it could not have meant to perpetuate what, so far as it may perhaps still exist at common law, would be an exception to

the primary purpose of the statute as a whole. Happily we are not confronted even with a verbal embarrassment; for, as we have just said, a "common carrier by water," does not cease to be such because it chooses to make an exception as to a part of the goods that it accepts.

Petition denied.

MOORE, *Circuit Judge* (dissenting):

I dissent.

The report and order of the Federal Maritime Board, the "Board" (and the affirmance thereof by the majority) are, in my opinion, at such variance with fundamental principles of freedom of contract, so misconstrue the purpose to be served by the Board and so exceed the powers granted and intended to be granted by Congress to the Board that I cannot subscribe to the decision. Furthermore, the decision now rendered is directly contrary, in my opinion to the recent decision of this court in this very case.[1] The history of the case is interesting.

The Facts.

The facts are virtually undisputed; only the legal conclusions therefrom are in issue. Prior to 1934 Grace Line had been engaged in carrying passengers and freight in its vessels between the west coast of South America and North Atlantic ports. It had never carried bananas and had no facilities to do so. Because of the unique nature of the banana and the highly specialized requirements for its successful transportation (hereinafter more fully developed), ordinary cargo space could not be used for this purpose. Special refrigerated and ventilated compartments

---

[1] *Grace Line, Inc.* v. *Federal Maritime Board*, 2 Cir., 1959, 263 F. 2d 709.

were required. Of prime importance to Grace Line was the assurance that, if it made the necessary substantial capital investment to install such compartments, it would have a customer which would regularly use the space over a long period so as to justify the expenditure. To the shipper, regularity of service and a long-term contract were also essential to a practical business enterprise in banana importation.

A few refrigerated compartments having been installed in 1934, Grace Line executed its first long-term contract with a shipper. Subsequently, certain other shippers (but not more than three at once) have used Grace Line's special facilities—always under similar long-term contracts.

At the present time, Grace Line still has a comparatively limited space for the carriage of bananas, consisting of six compartments (approximately 20,000 cubic feet each) on its weekly passenger-freight vessels, and four compartments (approximately 23,000 cubic feet each) on its fortnightly freighters. Since 1934 no shipper has taken less than a full compartment. Because of this space limitation and because of its prior contractual commitments, Grace Line during the years has been unable to honor requests for banana space from 31 persons and firms, exclusive of the two complainants and five intervenors in this proceeding.

The two complainants, Banana Distributors, Inc. and Arthur Schwartz, complaining that Grace Line's present contracts with its three shippers are "contrary to law and void," by formal complaint have asked the Board to order cancellation of the now outstanding contracts and to cause Grace Line immediately to allot a portion of its refrigerated space to complainants. Since complainants themselves concede that the banana importation business cannot be carried on successfully except under long-term contract, they demand that the existing two years' contracts be can-

celled, that the shippers who have built up and maintained regular shipments for many years be forthwith ousted and that complainants be given similar contracts. Anomalously and by some legerdemain quite foreign to my concepts of logic, the Board found the present contracts to be illegal as inconsistent with common carriage and then proceeded to award the same type of contract to the complainants. To me this is the usurpation by a governmental administrative agency of powers which would turn it into a superstate freight forwarding company with autocratic rights to decide which persons or importing companies should or should not engage in the banana trade and to direct how a steamship company should conduct its business. Needless to say, Grace Line appealed.

The First Appeal

On the first appeal, the issue of the validity of the Board's order was squarely raised. That order (served on August 20, 1957) amongst other directions ordered Grace Line to desist from continuing and performing its outstanding contracts within approximately six weeks and to offer to all qualified shippers refrigerated space to begin not later than October 1, 1957 for periods not to exceed two years. Grace Line was required to file with the Board, copies of the "two-year forward-bookings entered into hereunder" and "the criteria used by respondent [Grace Line] in determining what shippers are qualified" (presumably so that the Board could revise the business judgment and discretion exercised by Grace Line in operating its vessels).

The points raised by Grace Line upon appeal (virtually the same as now presented) were in substance that "Grace Line is a contract carrier of bananas"; that it did not hold itself out as a common carrier of bananas; and that the Shipping Act does not extend to a contract carrier of bananas.

The Board contended that under the Act a common carrier by water cannot act as a contract carrier with respect to a particular commodity which it transports in the same vessel as its common carriage. Thus, the Board took the definite position that an ocean carrier which transports commodities for the public generally cannot carry a particular commodity on a contract basis. Since Grace Line lists over four thousand items transported in common carriage, the Board concluded that contract carriage of any commodity was forbidden regardless of its unique character and the need for special facilities on the ship.

This court reversed the Board's order and citing many Supreme Court supporting cases said that "there are minimal standards beyond which the courts cannot allow administrative bodies to go," that "The reviewing court must satisfy itself that the administrative decision has a 'rational' or 'reasonable' foundation in law * * * (citing cases) * * * and that "when not so satisfied the court must reverse the administrative action, * * *" (263 F. 2d 709, 711). Thus, in reversing and remanding, this court clearly decided that it was not satisfied that the Board's decision had a rational or reasonable foundation in law. The Board's contention that specialized cargo could not be carried by contract on the same vessel which also carried general cargo in common carriage was not accepted, Judge Waterman saying for the court (p. 711):

> "The Board reasoned that since bananas are susceptible of common carriage petitioner could not transport them otherwise than in common carriage Such a test, a test based upon susceptibility only, tends, in effect, to eliminate contract carriage. Most, if not all, commodities are 'susceptible' of common carriage. This susceptibility test would appear to be clearly contrary to the Congressional purpose, for it is obvious that Congress intended that sections 14 and

16 should apply not to all carriers but only to 'common' carriers by water."

Had this court been willing to accept the Board's thesis that no commodity could be carried in contract carriage on a vessel also carrying goods in common carriage, affirmance was required. Such a holding, of course, would eliminate contract carriage. But this the court was unwilling to do because it believed such a result would be contrary to Congressional purpose and intent. Accordingly, it reversed and remanded the Board's order.

On remand merely "upon further consideration without arguments or hearings" and upon the same record and the same examiner's report, the Board decided that if this Court did not like its words "susceptibility test," it would "arrive at the same conclusion without reference to the susceptibility test." And so it did. Since the Grace Line's and the Board's arguments on this appeal are identical with those presented on the previous appeal, the case is now in the same posture as it was on the first appeal. The Board has paid no attention to the significance (if any) of the susceptibility test except to issue an order which is for all purpose the same as the order previously reversed. It is even called a "Supplementary Order" based upon a "Supplementary Report" which would make both appendages to the reversed order and the first report.

This analysis of the previous proceedings has been made because there is now a decision by the majority that denies to a common carrier the right to engage in contract carriage even though the merchandise concededly requires special handling and space and the importing business, which gives rise to the need for transportation space, demands long-term contracts and regular shipments. To admit, as does the Board, that Grace Line could carry bananas on a separate ship devoted to contract carriage but could not construct special compartments on one of its

present ships for this purpose is to create an artificial principle devoid of logic or reason. Grace Line as owner of many ships does not shift its status according to the name of the ship on which the goods are loaded.

The Banana Shipping Problem

Taking the facts only as found by the examiner and the Board, "only a limited quantity of fruit can be loaded in the reefer* space of Grace's vessels. If applicants be allocated part of the current space, the volume of bananas handled by Grace would be no greater than now, the only difference being that some if not all of the displaced fruit probably would become available to the new shippers." In other words, the old contract holders with whom Grace Line had done business for years would be replaced by newcomers with whom by Board edict new contracts would have to be made.

Most of the bananas imported into the United States originate in Central and South America. The bananas here involved are grown in Ecuador. Admittedly, the banana is a unique fruit in many respects, beginning to ripen immediately upon cutting. As its life span is about three weeks between cutting and marketing, quick transportation to market under favorable conditions is most important. Shoreside refrigeration before shipment or after unloading will not retard, appreciably, the ripening process. Furthermore, the additional handling in and out of storage will tend to injure the fruit and would subject it to increased costs.

The banana plant is very fast growing, beginning to produce in approximately 12 months. By careful pruning and constant cultivation, production can continue for many years. Cuttings once every 7 to 14 days are necessary,

* Refrigerated.

and since not more than five stems to the acre come to the proper grade each week, the cutter must go through the whole plantation each time. Most cuttings in Ecuador are made on orders which enable the fruit to reach Grace's vessels within 48 hours. The fruit is loaded in barges and brought down the streams at night. Loading on the vessels begins early in the morning and usually is completed within 12 hours.

Bananas throw off carbon dioxide gas in large quantities; in addition, they generate heat. The more advanced the fruit the greater tendency there is to ripen other fruit in the compartment. Proper refrigeration, ventilation, and stowage therefore are most important during the ocean transportation. Because individual shippers have their own particular views on the subject, under the Grace Line banana contracts, precooling and ventilation of the vessel's compartments are matters of discussion between the shipper and the vessel's chief engineer and the refrigeration engineer.

The Board's Order

As in the original reversed order, the Board in its supplementary order directs Grace Line to discontinue its present contracts and to offer "to its present shippers and to all qualified shippers, including complainants and their supporting intervenors, upon a fair and reasonable basis and upon reasonable notice, refrigerated space for the carriage of bananas on respondent's vessels from Ecuador to U. S. Atlantic ports for a period not to exceed two years, said period to begin not later than July 1, 1959, and shall thereafter offer, for periods not to exceed two years, refrigerated space available for such carriage."

The Board's order must have some rational relationship to the factual situation towards which it is directed. The statutory words "unfairly treat or unjustly discriminate"

cannot be applied *in vacuo*. The order requires Grace Line to offer refrigerated space for the carriage of bananas to all. At the present time, three shippers use the six compartments (20,000 cubic feet each or 120,000 cubic feet) on the weekly passenger-freight vessels. The two complainants, Banana Distributors and Schwartz, wish 50,000 cubic feet each on these vessels. The intervenor Martin desires two compartments or 40,000 cubic feet. The intervenor Grayson wants his fair share. The record speaks of 31 other applicants. Disregarding them entirely, although the order calls for a holding out "to all qualified shippers," here is a space demand of over 260,000 cubic feet on vessels having only 120,000 feet of refrigerated space. Surely the power of the Board does not extend to an order that Grace Line convert its passenger-freight vessels largely into banana carriers.

The Board would solve the problem by what it terms a "two-year forward-booking" plan. This is in reality nothing but a continuation of the very contract system which the Board has declared to be illegal. If the Board's pronouncement has any validity, namely, that contract carriage cannot exist on the same vessel as common carriage, this principle should apply to complainants' contracts as well as to those of the present shippers.

Another fact of vital importance is conceded by all. Bananas cannot be cut and brought to shipside by growers with the hope that there will be room enough for their shipment. There are no shore side refrigerating facilities and even if there were, the time elapsing before the next ship would cause spoilage. Therefore the importer must know and be assured before cutting that the bananas cut will be transported on a particular ship under his own refrigerating directions. Obviously special contracts are required.

As to space, assume the Board puts the present shippers out of business, keeps the 31 other applicants on the side-

lines and gives all the space to the complainants and intervenors. Substantial reductions will have to be made in their demands for space. Just as they all are in agreement that short-term contracts are not acceptable, can they operate a profitable importing business on a few bunches of bananas each? And will they undertake to finance a business knowing that in two years (or less if the Board chooses) they will have to discontinue their business and wait until their turns come up again in 4 or 6 years? The examiner already envisions at the end of the two-year period upon the appearance of others "there necessarily will have to be a realignment of the space for the ensuing period" (Dec. p. 204).

The problem presented is radically different from that of merchandise shipped in common carriage. Lumber, coal, steel bars, rubber and coffee can be stored in warehouses. They can be carried in the hold or even on the deck. They do not require the almost incubator care the banana demands. All these factors, in my opinion, establish the necessity of contract carriage. This being so is contract carriage irreconcilable with the statutes?

The statute applies only to a "common carrier by water" (46 U. S. C. A. §§812, 815). Grace Line is a common carrier. Common carriers must not give undue or unreasonable preferences as to cargo space. Therefore, syllogistically say the majority, Grace Line must not give preferences. But by this same formula any and all contract carriage by a common carrier is eliminated. I do not so construe the statutes or the intent of Congress.

If "We accept the test that at common law a carrier becomes a 'common carrier' only when it 'holds itself out' as such," Grace Line has not become a common carrier of bananas. The Board concedes that all the bananas carried since 1934 have been "by special contract." This being so, I cannot understand why the majority feels that it "need not decide in what circumstances, if at all, a carrier ever becomes subject to a common law duty of equal treatment

of shippers of goods as to which it has never specifically held itself out as a 'common carrier' " particularly since it assumes "that in the case at bar the Grace Line would be privileged at common law to select favorites from among banana shippers who are competing for cargo space in 'reefers.' " If common law is thus discarded, the answer must be found in the statutes. Here then is a decision which holds, in effect, that no common carrier can engage in contract carriage. This is a serious decision to make with respect to the American merchant marine. It may well be that Congress might wish to demand that the price of its subsidy should be the elimination of all contract carriage. This issue, however, should be decided by Congress after hearing the merits from both sides and not by the Board or the courts. If a susceptibility test, rejected by this court, "tends, in effect to eliminate contract carriage," this decision definitely eliminates it.

This court's comment that "it is obvious that Congress intended that sections 14 and 16 should apply not to all carriers but only to 'common' carriers by water" (263 F. 2d 709, 711) would appear to indicate that a distinction between "common" and "contract" carrier still exists and that the restrictions imposed by sections 14 and 16 would not apply to contract carriage. I cannot subscribe to the opinion that Congress intended by its statutory language or by implication to deprive the owner of a vessel or vessels generally engaged in common carriage of the privilege of devoting a small portion of its property to special use by persons with whom for good and sufficient reasons of commercial expediency it has made special contracts. Nor do I accept the issue as posed that "All that is here involved is that, if a shipper qualified, he may not be denied space at the pleasure, and for the profit, of the carrier." There is no proof in the record of any such quixotic selection of shippers.

The authorities put forward by both parties, presumably after intensive research, are of little assistance. Shipments

of lumber, a non-perishable commodity, *Patrick Lumber Company* v. *Calmar Steamship Corporation et al.*, 2 U. S. M. C. 494 (1941), silver electrical equipment *United States* v. *Louisville & Nashville Railroad Co.*, 6 Cir., 1955, 221 F. 2d 698, cotton *Ocean S.S. Co.* v. *Savannah Locomotive Works & Supply Co.*, 131 Ga. 831 (1909), or coal *Penna. R.R.* v. *Puritan Coal Co.*, 237 U. S. 121 (1915), are not helpful illustrations. Most analogous in a specialty field is a case involving a railroad, obviously a common carrier, which for years had carried livestock on a private contract basis. The court there held that the railroad was not a common carrier of livestock. *Lake Shore & Michigan Southern Railroad* v. *Perkins*, 25 Mich. 329 (1872).

The Supreme Court gave recognition to "why special contracts in reference to this business [express] are necessary" (*Express Cases*, 117 U. S. 1, 23) and selected as relevant to that determination criteria present in banana transportation, namely, speed, reasonable certainty in arrival time and careful custody. So many additional factors relating to specialized care of bananas are found here that *a fortiori* reasoning requires the same conclusion. This is really the only* case in which the question of limited space reserved by a common carrier for contract carriage was involved. The language of Mr. Chief Justice Waite could easily be paraphrased to fit the situation here.

> "As the business to be done is 'express,' it implies access to the train for loading at the latest, and for unloading at the earliest, convenient moment. All this is entirely inconsistent with the idea of an express business on passenger trains free to all express carriers. • • • This implies a special understanding and agreement as to the amount of car space that will be afforded, and the conditions on

* I do not regard the contract carriage of a particular dog by a particular individual in England in 1886 as particularly determinative of the problem here (*Dickson* v. *Great Northern Ry.*, 18 Q. B. D. 176 (CA1886)).

> which it is to be occupied, the particular trains that can be used, the places at which they shall stop, the price to be paid, and all the varying details of a business which is to be adjusted between two public servants, so that each can perform in the best manner its own particular duties. • • • The car space that can be given to the express business on a passenger train is, to a certain extent, limited, and, as has been seen, that which is allotted to a particular carrier must be, in a measure, under his exclusive control" (117 U. S. 1, 23-24).

The Board acknowledges "that banana shippers have made substantial investments in their trade, that the entire operation, from grower in Ecuador to retailer in the United States, requires careful coordination, that bananas ripen rapidly, that care in shipment is essential, that the fruit is highly perishable, and that loading is difficult and must be accomplished within a relatively short time" (Supp. Report, p. 230). The examiner likewise conceded that loading "presents practical problems"; that "the mixing of the fruit of more than one shipper in the same compartment can have unfavorable results"; that although there "might be some confusion at first, and understandably so, that fact alone should not preclude a bona fide trial period." After enumeration of factors which conclusively establish that banana transportation requires special care and equipment, the examiner avoids both the facts and the real issue by saying "The mere fact that bananas generally have been carried under special contract for a long time (the record is clear on this point) does not necessarily make them a specialty or justify their carriage in that manner" (Dec., p. 199). The need for contract shipment does not rest upon any such ground. And if the examiner's plan, adopted by the Board, results in damage, he is satisfied by the thought that "Bananas are not the only fruit subject to damage in transit, as is attested by the many cases in the law books." Whether the Board should by its decisions

add to those cases or attempt to reduce them rather answers itself.

In final analysis the report of the examiner and the orders of the Board to me more closely evidence a desire to perform a guinea pig experiment on the shipping industry rather than to cope in a practical way with the banana shipping problem. Without any personal responsibility or financial investment in any phase of the operation, they can safely issue decrees and watch with interest the result. A division of space amongst all might well make importation of bananas unfeasible for all. There are certain laws which the Board cannot change by order. The order will not enlarge the compartment space, it will not avoid the shipside loading, it will not change the ripening habits of the banana. The inexorable laws of economics and nature will not yield even to the Board. If the Board's order is enforced, there may be bananas in the same compartments and the same contract forms may be used. Only different shippers' names will appear thereon. "Newcomers to the trade," as the Board chooses to call them, will be the beneficiaries by Board order of the space and thus "unfairly treat or unjustly discriminate" against their would-be fellow shippers. And all this under the guise of the preservation of rights. But, *quaere*, of whom?

For all practical purposes, the sought-for application of Sections 14 and 16 of the Shipping Act of 1916 to the highly specialized limited space transportation of bananas would appear to present a case of first impression. The Board stands on at least a definite proposition that a common carrier cannot carry on the same vessel in special compartments goods by contract. With this proposition I disagree as a matter of reasonable interpretation of the statutes. Had Congress wished to outlaw contract carriage by common carriers, it would have or should have so legislated.

I would reverse again the Board's original order and reverse the supplementary order.

APPENDIX E

Order of the Court of Appeals for the Second Circuit Denying Petition for Rehearing.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirteenth day of August, one thousand nine hundred and sixty.

Present:

HON. LEARNED HAND,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
Circuit Judges

GRACE LINE INC.,
Petitioner,

vs.

FEDERAL MARITIME BOARD,
Respondent.

A petition for rehearing together with a request for in banc consideration having been filed by counsel for the petitioner herein,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

By Niall F. O'Doherty

Appendix E.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Filed: August 30, 1960

A. DANIEL FUSARO, Clerk

Grace Line Inc. v. *Federal Maritime Board*

Before: Hand, Waterman, Moore, C.JJ.

Moore, Circuit Judge, concurring in the result

I concur in the denial of the petition for a rehearing with its request for in banc consideration only because reconsideration on a rehearing would not change the result. The legal questions raised were carefully considered prior to the original decision. If the majority's construction of the Shipping Act is erroneous, the petitioner will have to seek relief by further appellate procedure.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Filed: September 7, 1960

A. DANIEL FUSARO, Clerk

APPENDIX F

Statutes Involved.

Section 1 of the Shipping Act, 46 USC §801 (1958):

"When used in this chapter:

"The term 'common carrier by water in foreign commerce' means a common carrier, except ferry-boats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: *Provided,* That a cargo boat commonly called an ocean tramp shall not be deemed such 'common carrier by water in foreign commerce.'

"The term 'common carrier by water in interstate commerce' means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

"The term 'common carrier by water' means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.

"The term 'other person subject to this chapter' means any person not included in the term 'common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

"The term 'person' includes corporations, partnerships, and associations, existing under or authorized by the laws of the United States, or any State, Territory, District, or possession thereof, or of any foreign country.

"The term 'vessel' includes all water craft and other artificial contrivances of whatever description and at whatever stage of construction, whether on the stocks or launched, which are used or are capable of being or are intended to be used as a means of transportation on water.

"The term 'documented under the laws of the United States' means 'registered, enrolled, or licensed under the laws of the United States.' "

Section 14 of the Shipping Act, 46 USC §812 (1958):

"No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

"First. Pay or allow, or enter into any combination, agreement, or understanding, express or implied, to pay or allow a deferred rebate to any shipper. The term 'deferred rebate' in this chapter means a return of any portion of the freight money by a carrier to any shipper as a consideration for the giving of all or any portion of his shipments to the same or any other carrier, or for any other purpose, the payment of which is deferred beyond the completion of the service for which it is paid, and is made only if, during both the period for which computed and the period of deferment, the

shipper has complied with the terms of the rebate agreement or arrangement.

"Second. Use a fighting ship either separately or in conjunction with any other carrier, through agreement or otherwise. The term 'fighting ship' in this chapter means a vessel used in a particular trade by a carrier or group of carriers for the purpose of excluding, preventing, or reducing competition by driving another carrier out of said trade.

"Third. Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

"Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

"Any carrier who violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $25,000 for each offense."

Section 16 of the Shipping Act, 46 USC § 815 (1958):

"It shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair

device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

"It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

"First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means.

"Third. To induce, persuade, or otherwise influence any marine insurance company or underwriter, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier or other person subject to this chapter.

"Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense."

E COPY

Office-Supreme Court, U.S.
FILED
DEC 22 1960
JAMES R. BROWNING, Clerk

No. 542

In the Supreme Court of the United States

OCTOBER TERM, 1960

GRACE LINE, INC., PETITIONER

v.

FEDERAL MARITIME BOARD.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND FEDERAL MARITIME BOARD IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
ROBERT A. BICKS,
Assistant Attorney General,
IRWIN A. SEIBEL,
Attorney,
Department of Justice, Washington 25, D.C.

ROBERT E. MITCHELL,
Assistant General Counsel,
ROBERT J. BLACKWELL,
Attorney,
Federal Maritime Board, Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	4
Argument	12
Conclusion	17

CITATIONS

Cases:

Boynton v. *Virginia*, No. 7, this Term, decided December 5, 1960	13
Consolo, Philip R. v. *Grace Line, Inc.*, 4 F.M.B. 293	6, 14
Consolo, Philip R., and Banana Distributors, Inc. v. *Grancolombiana*, 5 F.M.B. 633	8, 14
Express Cases, 117 U.S. 1	16
Grace Line, Inc. v. *Federal Maritime Board*, 263 F. 2d 709	9
Honeyman v. *Oregon & California R. Co.*, 13 Ore. 352	16
In the Matter of Agreements 6210, 2 U.S.M.C. 166	14
Lake Shore & Michigan Southern R. Co. v. *Perkins*, 25 Mich. 329	16
Transportation by Mendez & Co., 2 U.S.M.C. 717	14
United States v. *Baltimore & Ohio R. Co.*, 333 U.S. 169	13, 14

Statutes:

	Page
Interstate Commerce Act, Sections 3(1) and 216(d), 49 U.S.C. 3(1) and 316(d)	13
Shipping Act, 46 U.S.C. 801, 812, 815:	
Section 1	2, 3, 15
Section 14	2, 3, 4, 8, 10, 11, 12
Section 15	5
Section 16	2, 4, 8, 10, 11, 12, 13
5 U.S.C. 1034	4
Miscellaneous:	
H.R. 15455, 64th Cong., 1st Sess	15
53 Cong. Rec. 12,353 13,365, 13,426	15

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 542

GRACE LINE, INC., PETITIONER

v.

FEDERAL MARITIME BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND FEDERAL MARITIME BOARD IN OPPOSITION

OPINIONS BELOW

This case has been before the Court of Appeals twice. The Board's first Report (Pet. 1a–12a) is reported at 5 F.M.B. 278, and the first opinion of the Court of Appeals, dated February 13, 1959 (Pet. 13a–16a), is reported at 263 F. 2d 709. The Supplementary Report of the Board (Pet. 17a–34a) is reported at 5 F.M.B. 615, and the second opinion of the Court of Appeals, dated July 13, 1960 (Pet. 35a–52a), is reported at 280 F. 2d 790.

JURISDICTION

The decision of the Court of Appeals was rendered on July 13, 1960, a timely petition for rehearing was denied on August 30, 1960 (Pet. 53a–54a), and the

Court's decree was entered on September 27, 1960 (R. 335). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioner, a common carrier by water, hauls over 150 different commodities northbound in the trade between the west coast of South America and the Atlantic coast of the United States. It is the only carrier which provides adequate service for the shipment of bananas from Ecuador to New York. In general, petitioner carries commodities, including perishable fruit, for all qualified shippers indiscriminately. The one exception is bananas. As to bananas (which it regularly carries on the same vessels along with the other commodities), petitioner has always made its facilities available only to preferred shippers, never to all qualified shippers indiscriminately.

The question presented is whether the Shipping Act, which declares that a common carrier by water shall not "unjustly discriminate against any shipper in the matter of * * * cargo space" (§ 14), or "subject any particular person * * * to any undue * * * disadvantage in any respect whatsoever" (§ 16), does not apply to petitioner's carriage of bananas because such carriage requires "special" handling and petitioner has chosen to except bananas from the commodities which it "holds itself out" as carrying for all qualified shippers indiscriminately.

STATUTE INVOLVED

Sections 1, 14 and 16 of the Shipping Act, 46 U.S.C. 801, 812, 815, are reprinted in full at pp. 55a–58a of

the petition. Pertinent portions thereof are set forth below:

> SEC. 1. The term "common carrier by water in foreign commerce" means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States or any of its Districts, Territories, or possessions and a foreign country, whether in the import or export trade: *Provided*, That a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce."
>
> * * * * * *
>
> The term "common carrier by water" means a common carrier by water in foreign commerce or a common carrier by water in interstate commerce on the high seas or the Great Lakes on regular routes from port to port.
>
> * * * * * *
>
> SEC. 14. No common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—
>
> * * * * * *
>
> Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight

in proper condition; or (c) the adjustment and settlement of claims.

* * * * * *

SEC. 16. * * *

It shall be unlawful for any common carrier by water * * *

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

* * * * * *

STATEMENT

This litigation was begun by the complaints of two shippers of bananas, filed with the Federal Maritime Board,[1] alleging that petitioner's practice of refusing them any space on its vessels from Ecuador to New York or other United States Atlantic ports and of allocating all of the space suitable for the carriage of bananas to three shippers constituted unjust discrimination in violation of Section 14 of the Shipping Act and subjected complainants to undue prejudice and disadvantage in violation of Section 16 of the Act (R. 4–8, 13–17).[2]

---

[1] The United States as well as the Federal Maritime Board is a respondent herein pursuant to 5 U.S.C. 1034. The Federal Maritime Board and its predecessors, the United States Maritime Commission (1936 to 1950) and the United States Shipping Board (1916 to 1936) are hereinafter referred to as the "Board."

[2] Complainants also sought reparations. However, it was agreed by all parties to defer that issue until the issue of liability had been determined.

A consolidated hearing on the two complaints was had before a Hearing Examiner, other banana shippers intervening in support and in opposition (R. 217). At this hearing, the following undisputed facts were established (R. 219):

Petitioner is the only United States flag operator offering a regular common carrier service between ports in Ecuador and ports on the Atlantic Coast of the United States. That service is an integral part of its common carrier service on Essential Foreign Trade Route 2, in the operation of which petitioner receives an operating-differential subsidy from the United States Government (R. 70, 219).[3]

In this service, petitioner operates vessels which carry over 150 commodities northbound on regular sailings (R. 219). These commodities are admittedly carried by petitioner as a "common carrier." (R. 62–63, 70, 72, 219.) As to these, therefore, petitioner does not assert a right to "unjustly discriminate" against any qualified shipper or to give any "undue preference" to any person. The one exception is bananas, which petitioner carries in substantial volume from Ecuador on the same vessels as the other commodities (R. 36, 70, 75, 219). As to these, petitioner does claim the right to pick and choose among qualified shippers (R. 222).

[3] Petitioner is also a member of the Association of West Coast Steamship Companies, a Conference approved by the Board under Section 15 of the Act, and operating in the trade between the West Coast of South America and the U.S. Atlantic Coast. The Conference is open only to "common carriers" (R. 219).

Petitioner began the carriage of bananas in 1934 and has built up its banana-carriage business to the point that bananas are the largest single commodity it carries northbound from Ecuador (R. 36, 70). Petitioner's carriage of bananas has always been by "special contract." Since 1953 all of the space on petitioner's vessels suitable for the carriage of bananas has been allocated to three shippers selected by petitioner (R. 220)[4] under contracts renewable at the option of petitioner (R. 36, 220). Each shipper having a contract loads petitioner's vessels at Guayaquil, Ecuador, at his own risk and expense, and unloading is done by petitioner at the risk, and for the account, of the shipper (R. 220).

The shipping and marketing of bananas, because of the nature of the commodity, require a carefully synchronized operation. The bananas must be loaded in refrigerated compartments (reefers), with which each of petitioner's vessels is equipped, and the temperature must be maintained within specified limits. Once cut from the plants, the bananas cannot remain in

---

[4] One of the three, Philip R. Consolo, secured his contract with petitioner only after filing a complaint with the Board. In that case the Board, on facts indistinguishable from the present case, issued a Report finding that petitioner as a common carrier was amenable to the proscriptions against discrimination contained in Sections 14 and 16 of the Act (R. 48–55). *Philip R. Consolo* v. *Grace Line, Inc.*, 4 F.M.B. 293. Before the Board entered an order, but following the issuance of the Report, and presumably as a result of the Report, petitioner gave Consolo a two-year contract for one reefer compartment on each combination vessel and one such compartment on each freighter. That contract was subsequently renewed.

marketable condition for more than about three weeks, during which time they continue to ripen, although reefers will slow down the process. There are no refrigerated warehouses in Guayaquil to delay the ripening process while the bananas await loading onto a ship (which is done from barges alongside). It is vital to the shipper to have his fruit reach the ultimate consumer as quickly as possible (R. 220). The shipper must therefore know in advance upon what space and ship he can rely to load and carry his shipment.

Among the commodities which petitioner also transports in the same vessels is Chilean fruit, which it carries in cold storage boxes.[5] This fruit, like bananas, is perishable, and requires "special arrangements" with the shippers (R. 221). Petitioner concedes that it does not have the right to pick and choose among qualified shippers of Chilean fruit, and in recognition of its duties makes an equitable apportionment of the space among shippers in proportion to the volume of their past shipments whenever the cargo offerings exceed the available vessel capacity. Petitioner also reserves at least 25 per cent of the available refrigerated capacity for new accounts (R. 139–140) and, contrary to its treatment of bananas, it does not restrict the movement of Chilean fruit to a few shippers with exclusive contracts.

[5] During times of space shortage, the Chilean fruit is sometimes carried under refrigeration in the same reefer compartments which are used for bananas (R. 60–61), thus reducing the space otherwise available for bananas (R. 221).

Petitioner is the only carrier which provides an adequate banana service from Ecuador to New York. Four other steamship companies carry bananas in this trade. Two of them, however, are proprietary carriers transporting only bananas which they themselves own; one of them is not a satisfactory banana carrier due to infrequent or irregular service; and the other, Grancolombiana Line,* calls at Philadelphia before New York City, substantially delaying its delivery of bananas to the latter port (R. 32–34, 76–77, 134–135, 219).

Both the Hearing Examiner and the Board came to practically identical conclusions (R. 206–207), namely, that petitioner was unjustly discriminating in violation of Sections 14 and 16 of the Shipping Act, in excluding qualified shippers from the use of reefer space and that it should cancel its existing contracts and henceforth apportion this space on a fair and reasonable basis under forward-booking arrangements (R. 206–207).

---

* Following the decision in the instant case, the Board, on similar facts, found that "in the operation of its freighter vessels between Ecuador and U.S. North Atlantic ports * * * [Grancolombiana Line] is a common carrier by water in the foreign commerce of the United States, and therefore is subject to the provisions of the Shipping Act and to the jurisdiction of this Board. It is of no moment that [Grancolombiana] has restricted its banana carryings to special contracts * * *." *Philip R. Consolo and Banana Distributors, Inc.* v. *Grancolombiana*, Docket Nos. 827, 841, 5 F.M.B. 633, 638.

That order is now the subject of a petition for review before the Court of Appeals for the District of Columbia Circuit, but proceedings therein have been held in abeyance pending determination of the instant case.

In its original Report, the Board rested its conclusion on the ground that bananas are "susceptible" to "common carriage" (Pet. 8a, R. 165). This holding was made because petitioner had relied almost exclusively on the argument that bananas were not as a practical matter "susceptible" to "common carriage" and consequently petitioner should not be required to carry them on that basis. On the evidence, the Board found to the contrary, concluding that there were not in fact extraordinary obstacles to petitioner's carrying bananas for all qualified shippers (Pet. 1a–12a).

On review, the Court of Appeals reversed and remanded, holding that whether or not bananas are "susceptible" of "common carriage" was an insufficient test since all, or nearly all, goods are "susceptible" of "common carriage". *Grace Line, Inc.* v. *Federal Maritime Board*, 263 F. 2d 709, 711 (Pet. 13a–16a).

Following remand, the Board issued a Supplementary Report (Pet. 17a–34a, R. 215–232),[7] in which it reaffirmed its conclusion that petitioner's allocation of the entire reefer space on its vessels to those banana shippers which petitioner selected, to the ex-

[7] Petitioner notes that upon remand the Supplementary Report and Order were issued without further hearing and on the same record (Pet. 9). Petitioner fails to point out, however, that the proceedings which led to the original Report and Order included lengthy hearing and full opportunity to all parties to make extensive argument. Nor does petitioner suggest that material facts are lacking or that any party requested further hearing or argument in the remanded proceedings.

clusion of other qualified banana shippers, violated Sections 14 and 16 of the Act. Petitioner is admittedly a common carrier, the Board noted, and the Act makes it unlawful for a common carrier to "unjustly discriminate against any shipper in the matter of * * * cargo space" (§ 14) or to "give any undue or unreasonable preference or advantage to any * * * person" (§ 16). Since "[t]he Act confers jurisdiction over *carriers*, specifically over 'common carriers' as distinguished from granting jurisdiction over types of *carriage*, i.e., common or contract * * *" (Pet. 28a), petitioner may not play favorites among otherwise qualified shippers in "the movement of any commodity * * *, regardless of the name the carrier uses in connection with it—or any part of it—" (Pet. 28a–29a). The Board accordingly rejected petitioner's contention that it may exempt its carriage of bananas from the ban against discrimination merely by singling out bananas for carriage on a "contract" basis (Pet. 26a–29a).

The Board recognized that a common carrier by water may limit its "holding out" so as to refuse to carry certain goods at all,* but it held that as to any goods which petitioner—a common carrier—undertakes to carry, it has a duty "to serve similarly situated shippers alike" (Pet. 28a, 29a).

The Board also acknowledged that there are difficulties in the transportation of bananas but found

---

*A common carrier might lawfully refuse to carry contaminating or malodorous materials, or dangerous commodities, or such other commodities as it might reasonably deem to be unsuitable for transportation.

that these were not insurmountable (Pet. 31a–32a) and are "not an excuse for a common carrier discriminating against some shippers in favor of a few" (Pet. 32a). At the same time, the Board, in recognition of the "special" handling required in the carriage of bananas, authorized petitioner to prescribe reasonable requirements to which prospective shippers must conform in order to qualify (Pet. 34a). These requirements include the posting of a performance bond by a shipper, and rules protecting petitioner against dead freight and against the risks and expenses of loading, stowage, and unloading (*ibid.*). The sufficiency of these requirements, which have been in force since 1957, has not been challenged.

The court of appeals, in an opinion by Judge Hand (Pet. 35a–40a) (Judge Moore dissenting, Pet. 40a–52a), upheld the position of the Hearing Examiner and the Board. It concluded that the authority conferred on the Board by the Shipping Act to enforce the ban against unjust discrimination by a common carrier extends to all goods which it carries. The court noted that Sections 14 and 16 of the Act in terms prohibit a common carrier from unjustly discriminating and giving an undue preference, and stated that it could see no reason to add to "common carrier" the qualifying phrase "while acting as such" and thereby to give a person, admittedly a common carrier, the right to discriminate as to a portion of the goods it regularly carries. The court observed that "'a common carrier by water' does not cease to be such because it chooses to make an exception as to a part of the goods that it accepts" (Pet. 40a). The

court recognized that certain goods, such as bananas, may require "special" carriage and that therefore the carrier may prescribe reasonable requirements to which a shipper must conform (Pet. 39a). But "[a]ll that is here involved is that, if a shipper qualified, he may not be denied space at the pleasure, and for the profit, of the carrier" (*ibid.*).

ARGUMENT

Petitioner repeatedly states the issue in very broad terms—whether the Shipping Act extends to "all" activities of a common carrier by water (Pet. 2-3, 5, 10, 11, 13, 15, 23). The issue is rather the much narrower one of whether the anti-discrimination provisions of the Act (§§ 14 and 16) do not apply to a common carrier's carriage of a particular commodity merely because the carrier, although having undertaken to carry the commodity, has not undertaken to carry it for all who qualify. On this issue, the decision below is plainly correct and in accord with the views of this Court concerning the effect of similar provisions of the Interstate Commerce Act. Further review by this Court is therefore not warranted.

The Shipping Act, in so many words, prohibits a common carrier from engaging in the kind of conduct here involved. The Act makes it unlawful for a common carrier by water "directly or indirectly", to "unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities * * *" (§ 14, Fourth, *supra*, p. 3), or to give "any undue or unreasonable preference or advantage to any particular person * * * in any respect whatso-

ever, or to subject any particular person * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever" (§ 16, First, *supra*, p. 4). The court below read the statute as written. It could see no reason to qualify the language by adding to "common carrier" the phrase "while acting as such" and thereby to relieve one admittedly a common carrier of the duty not to discriminate as to a portion of the goods it regularly carries.

This refusal of the court below to narrow the scope of the statutory ban against discrimination accords with this Court's views with respect to the similar provisions contained in §§ 3(1) and 216(d) of the Interstate Commerce Act, 49 U.S.C. 3(1), 316(d). See *United States* v. *Baltimore & Ohio R. Co.*, 333 U.S. 169, 175 and cases cited; cf. *Boynton* v. *Virginia*, No. 7, this Term, decided December 5, 1960. In the *Baltimore & Ohio* case, *supra*, a stockyards company owned a segment of a railroad spur track. Under the terms of a contract between it and a common carrier by rail, the carrier could freely use the segment as part of its line for delivery of all commodities except livestock, but was precluded from using the segment for delivery of livestock, thereby placing the shippers served by the spur track at a disadvantage with nearby competitors whose sidings were served without use of the segment owned by the stockyards company. The Court held that the statutory language and policy against discrimination are of such broad scope that the carrier was under a duty to comply, notwithstanding the requirements of its contract with the track

owner, and that the latter could not legally enforce conditions which interfere with performance of the carrier's statutory duty. In refusing to limit the commands of the statute against discriminatory transportation services, the Court stated (333 U.S. at 175):

> The [Interstate Commerce] Act, and all amendments to it, have aimed at wiping out discriminations of all types, * * * and language of the broadest scope has been used to accomplish all the purposes of the Act. * * *

The anti-discrimination provisions of the Shipping Act are at least equally broad in scope, and we submit that the court below was plainly correct in refusing to narrow the protection they afford.

On the issue of discrimination between shippers, the Board has consistently taken the position that a common carrier is under a duty to treat alike all who qualify, regardless of the label, "contract" or otherwise, the carrier may attach to the carriage of a particular commodity.[9] *Philip R. Consolo* v. *Grace Line, Inc.*, 4 F.M.B. 293; *Philip R. Consolo and Banana Distributors, Inc.* v. *Grancolombiana*, 5 F.M.B. 633.[10] Cf. *In the Matter of Agreements 6210*, 2 U.S.M.C. 166; *Transportation by Mendez & Co.*, 2 U.S.M.C. 717. In *Consolo* v. *Grace Line, Inc.*, *supra*, in reaching a result identical with that reached here in connection with an earlier request by a banana shipper for space

[9] Although petitioner has charged the Board with inconsistency (Pet. 31), it has failed to point to a single case in which the Board has allowed a common carrier to discriminate between shippers.

[10] See note 6, *supra*, p. 8.

on petitioner's ships from Ecuador to the United States,[11] the Board stated (4 F.M.B. at 300):

> Respondent admits that it has undertaken to carry general cargo from Ecuador to the United States for all persons indifferently, and has for many years done so on its combination and freighter vessels. We think this admitted fact is determinative of this proceeding and that, in spite of special arrangements of whatever sort, respondent may not lawfully * * * grant to any shipper on such vessel * * * special advantages not accorded to all persons indifferently.

Petitioner's reliance on legislative history (Pet. 20–22) is misplaced. The legislative discussion related to the intent of Congress not to include within the Board's regulatory jurisdiction bailees for hire, so-called tramp steamers, including ore carriers on the Great Lakes (53 Cong. Rec. 12,353, 13,365, 13,426).[12]

---

[11] See note 4, *supra*, p. 6.

[12] Section 1 of the Act (46 U.S.C. 801) defines "common carrier by water in foreign commerce" to mean "a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States * * * and a foreign country * * *: *Provided*, That a cargo boat commonly called an ocean tramp shall not be deemed such 'common carrier by water in foreign commerce.'" As originally passed by the House (H.R. 15455, 64th Cong., 1st Sess.), the definition did not contain the proviso which states that ocean tramps are not common carriers. The proviso was added by the Senate because of fear that, as drafted, the bill might give the Board regulatory jurisdiction over tramp steamers, including ore carriers on the Great Lakes (53 Cong. Rec. 13,365).

But the issue here is not whether petitioner is a common carrier or a tramp steamer; petitioner is admittedly a common carrier. And legislative history supports the view that tramp steamers are the only carriers, other than ferry boats, which Congress intended to exclude from the Board's jurisdiction.

Of all the cases cited by petitioner (other than the Board decisions referred to above, p. 14), none involved discrimination, with the possible exception of two cases—*Express Cases*, 117 U.S. 1, and *Lake Shore & Michigan Southern R. Co.* v. *Perkins*, 25 Mich. 329. Neither of these cases was under the Shipping Act, nor did either concern the problem of shippers competing for space granted to a preferred shipper. *Express Cases, supra*, decided in 1885, concerned the relationship between the railroads and another group of common carriers—express companies. The *Perkins* case, *supra*, decided in 1872, concerned the question of whether, with respect to carriage of livestock, a railroad which carried for all shippers alike could by contract relieve itself of the standard of care imposed on common carriers. But the Michigan court, which permitted such a contract, was in a minority as to this question. See *Honeyman* v. *Oregon & California R. Co.*, 13 Ore. 352, 355.

Contrary to the suggestion contained in petitioner's statement of its second question (Pet. 3) and of its second point (Pet. 24, 29), the court below did not defer to the ruling of the Board regarding the scope of the Act, although it did indicate (Pet. 39a) that

the Board was better qualified to decide relevant issues of maritime policy.[13]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

ROBERT A. BICKS,
Assistant Attorney General.

IRWIN A. SEIBEL,
Attorney.

ROBERT E. MITCHELL,
Assistant General Counsel,

ROBERT J. BLACKWELL,
Attorney,
Federal Maritime Board.

DECEMBER 1960.

---

[13] Petitioner also makes much of the fact that bananas require a "special" kind of carriage (Pet. 6, 7, 13). But this fact does not relieve it of the duty not to discriminate. The specialized problems in the transportation of bananas may justify petitioner in imposing special conditions upon its carriage, as the Board here authorized it to do. But, since petitioner's ships concededly are general common carriers in the trade, these conditions, under the Act, may not be discriminatory or prejudicial among shippers.

U. S. GOVERNMENT PRINTING OFFICE: 1960

LE COPY

Office-Supreme Court, U.S.
FILED
DEC 30 1950
JAMES R. BROWNING, Clerk

Supreme Court of the United States

No. 542

REPLY BRIEF FOR PETITIONER.

TABLE OF CONTENTS.

	PAGE
STATEMENT OF THE CASE	1
I—The Decision Below Will Have An Important Impact on International Shipping	6
II—The Majority Below Misconstrued the Shipping Act	8
III—The Decision of the Majority Below Constitutes a Departure from the Proper Course of Judicial Proceedings on Review of Administrative Action	13
CONCLUSION	14

Table of Cases.

	PAGE
Boynton v. *Virginia*, 81 Sup. Ct. 182 (1960)	10
Cleveland, C., C. & St. L. Ry. Co. v. *Henry*, 170 Ind. 94, 83 N. E. 710 (1908)	9
Consolo v. *Grace Line, Inc.*, 4 F. M. B. 293 (1953)	10, 11
Dickson v. *Great Northern Railway*, 18 Q. B. D. 176 (C. A. 1886)	9
Express cases, 117 U. S. 1 (1886)	9
Galveston Chamber of Commerce v. *Saguenay Terminals*, 4 F. M. B. 375 (1954)	12
Lake Shore & Michigan Southern Railroad v. *Perkins*, 25 Mich. 329 (1872)	9
Mt. Tom Motor Lines v. *McKesson & Robbins*, 325 Mass. 45, 89 N. E. 2d 3 (1949)	9
New York Marine Co. v. *Buffalo Barge Towing Corp.*, 2 U. S. M. C. 216 (1939)	11
Transportation by Mendez & Co., 2 U. S. M. C. 718 (1944)	10
United States v. *Baltimore & Ohio Railroad Co.*, 333 U. S. 169 (1948)	10
United States v. *Contract Steel Carriers*, 350 U. S. 409 (1956)	3
United States v. *Louisville & Nashville Railroad*, 221 F. 2d 698 (6th Cir. 1955)	8

Statutes.

	PAGE
Motor Carrier Act (Part II of the Interstate Commerce Act), 49 U. S. C. §§301 *et seq.* (1958)	3
Water Carrier Act (Part III of the Interstate Commerce Act), 49 U. S. C. §§901 *et seq.* (1958)	3

Other Authorities.

Dobie, *Bailments and Carriers* 298 (1914)	9
1 Hutchinson *Law of Carriers* 38 (3rd Ed. 1906)	9
1 *Moore on Carriers* 4 (2d Ed. 1914)	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 542

GRACE LINE, INC.,

Petitioner,

v.

FEDERAL MARITIME BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER.

This Reply Brief is submitted in response to the Brief in Opposition submitted by respondents, the United States and the Federal Maritime Board.

Statement of the Case.

A reading of the Brief in Opposition reaffirms the absence of any factual dispute and reemphasizes the fact that the central issue in this case is an important question relating to the construction of the Shipping Act and its impact on international shipping. That issue is whether the Shipping Act applies to and outlaws all contract carrier activities conducted by common carriers—both foreign and domestic—serving United States ports.

The Brief in Opposition, in its statement of the case, does not dispute the basic facts which establish that peti-

tioner is, and always has been, a contract carrier, rather than a common carrier, of bananas.

The Brief in Opposition concedes what the Board itself found: that petitioner's carriage of bananas has always been by "special contract" (p. 6); that the carriage of bananas involves a high degree of specialization (pp. 6-7); that the shipping of bananas requires "a carefully synchronized operation" (p. 6); that "It is vital to the shipper to have his fruit reach the ultimate consumer as quickly as possible" (p. 7); and that the shipper must "know in advance upon what space and ship he can rely to load and carry his shipment" (p. 7). The Brief in Opposition omits to state, but does not deny, the additional important fact that bananas grow continuously and must be harvested and shipped weekly with the consequence that banana shippers must enter into long-term transportation contracts which will insure the availability of space on a precise schedule over a long period of time (Petition, pp. 25a-26a).*

The Brief in Opposition also concedes—by its silence—that:

> In providing contract carriage of bananas petitioner has followed a practice pursued by all regular ocean carriers of bananas (Petition, p. 8).
>
> Petitioner is the first carrier anywhere in the world to be told that it must attempt to operate as a common carrier of bananas (Petition, p. 8).
>
> In barring contract carrier activities by a person engaged in common carriage the Board has placed more stringent controls on international water carriers than are applicable to domestic trains and vessels (Petition, pp. 5; 13, note; 15-19).

* Respondents seek to confuse the issue by their statement that the fact that bananas require a special kind of carriage does not relieve petitioner of "the duty not to discriminate" (Brief in Opposition, p. 17, note 13). The point is, however, that the existence of specialization, together with the absence of a holding out, demonstrates that petitioner is a contract carrier of bananas. The Shipping Act is therefore inapplicable and petitioner may properly provide this specialized service for a limited number of shippers.

Although the Brief in Opposition's statement of the case does not raise any factual issue, it employs several devices in an effort to obscure the central issue of law and to minimize its importance.

First, the entire Brief in Opposition is pervaded by a misleading suggestion that there is no real distinction between common and contract carriage and that any difference is merely a matter of labelling. Thus at page 10 the Brief refers to distinctions based on "the name the carrier uses" in performing certain transportation. Similarly, on page 14 the Brief states that the Board has consistently taken the position that the common carrier must treat all alike "regardless of the label, 'contract' or otherwise, the carrier may attach to the carriage of a particular commodity."

The difference between two essentially different modes of doing business cannot be so lightly dismissed. The distinction between common and contract carriage has a centuries-old basis both in law and in fact. These are two fundamentally different kinds of transportation which involve different legal obligations and consequences, both at common law and under the various statutory patterns applied to persons engaged in the business of transportation.* A common carrier holds himself out to the public to carry goods of certain kinds, or all kinds, for all who wish to ship them. A contract carrier performs a specialized transportation service to fulfill the needs of particular shippers.

The majority opinion below did not regard the difference between contract and common carriers as merely one of labels, nor could it. Thus the opinion made reference to

* For example, the Motor Carrier Act (Part II of the Interstate Commerce Act), 49 U. S. C. §§301 *et seq.* (1958) and the Water Carrier Act (Part III of the Interstate Commerce Act), 49 U. S. C. §§901 *et seq.* (1958), both provide different kinds of regulation for common and contract carriers. This Court has frequently had occasion to consider the differences between these two modes of doing business. *E.g.*, *United States* v. *Contract Steel Carriers*, 350 U. S. 409 (1956).

the separate and distinct concepts "common carrier" and "contract carrier" and, indeed, recognized that there was no doubt that at common law a " 'common carrier' may on occasion carry by contract" (Petition, p. 37a). The record below, and the facts conceded by respondents, make it plain that petitioner is, and has been, a contract carrier of bananas by virtue of the manner in which it has carried that commodity. The central issue presented here, and which respondents' brief seeks to obscure, is whether petitioner's contract carrier activities were outlawed by the Shipping Act of 1916.*

Respondents also seek to obscure the central issue in this case by the persistent use of phrases like "unjustly discriminating" (p. 5). They seek to leave the impression that there was some pernicious motive in petitioner's failure to carry bananas for all who offered them for shipment. All that petitioner did was to make the same determination which has been made by all other regular ocean carriers of bananas, that is, the determination that bananas require the

---

* Respondents also seek to obscure the distinction between petitioner's contract carrier and its common carrier activities by certain factual distortions. Respondents make much of the fact that petitioner is a common carrier of Chilean fruit. Respondents' brief fails, however, to note the many significant differences between the transportation of Chilean fruit and the transportation of bananas. Thus the record shows that Chilean fruit can be stored for substantial periods of time at shoreside. This concededly cannot be done with bananas and is one of the crucial factors requiring such careful synchronization in their handling and shipment (R. 60-61; 73-74). There is no evidence in the record that Chilean fruit must be harvested weekly, that Chilean fruit growers require long-term commitments from shippers, that a specific amount of space on a specific vessel is necessary to the trade, that specialized treatment is required during the voyage, that a long-term space commitment is a prerequisite, etc. If respondents are seeking to suggest that petitioner must be treated as a common carrier of bananas because it is a common carrier of the different and distinct commodity of Chilean fruit, they also ignore the important fact that petitioner had admittedly held itself out to the public as a common carrier of Chilean fruit.

The Brief in Opposition also points to the fact that petitioner is a member of the Association of West Coast Steamship Companies, a conference "open only to 'common carriers' " (p. 5). The Brief fails to mention the uncontradicted testimony in the record that the conference agreement was not intended by any of the participants to include banana carriage, which was "understood by all lines to be an exception because of the nature of that article" (R. 35).

offering of a specialized service tailored to the needs of a limited number of shippers. There is of course some selection necessarily involved in providing such service; by its very nature it cannot be offered to everyone. This is the hallmark of contract carriage, and it is the offering of a contract carrier service which constitutes, in and of itself, the "unjust discrimination" to which respondents refer.

Respondents also engage in loose talk about an alleged right "to pick and choose" among shippers (Brief in Opposition, p. 5), with an implied suggestion that petitioner claims a right of arbitrary discrimination among shippers of arbitrarily selected commodities. Petitioner claims no such right; it urges only that it is not barred from acting as a contract carrier when the circumstances demonstrate that contract carriage has been and may properly be conducted. Petitioner has at all times conceded that the Board has authority to determine:

> whether bananas are a specialty,
> whether petitioner has held itself out as a common carrier of bananas by its words or its actions, and
> whether petitioner's contract carriage of bananas has any detrimental effect on its common carriage of other commodities.

Here the Board has conceded that bananas are a specialty, it has conceded that there has been no holding out, and it has found no detrimental effect on petitioner's common carriage. Nevertheless the Board and the Court of Appeals have outlawed petitioner's banana carriage on the doctrinaire view that a common carrier may never act as a contract carrier.

Significantly, the Board has conceded that "a common carrier by water may except certain goods from its holding out to carry . . ." (R. 227) and that petitioner "has not held

itself out as a common carrier of bananas, . . ." (R. 224).* Thus petitioner admittedly has no duty to carry bananas. Respondents would presumably also concede that if petitioner engaged only in the contract carriage of bananas and performed no service as a common carrier, its activities would be unregulated by the Shipping Act and it could carry bananas for whomever it pleased. Yet the juxtaposition of a common carrier and a contract carrier service in the same "entity"—notwithstanding that the contract service involves a completely distinct commodity and leaves the common carrier service unaffected—is flatly condemned. It is this ruling which petitioner challenges here.

I.

The Decision Below Will Have An Important Impact on International Shipping.

Respondents' brief makes no serious effort to challenge petitioner's description of the impact of the decision below or petitioner's estimate of the importance of that decision for international shipping.

Respondents suggest only that petitioner has stated the issue too broadly when it phrases that issue in terms of extending the Shipping Act to all activities of a common carrier by water (p. 12). A reading of the Brief in Opposition itself demonstrates, however, the accuracy of petitioner's statement. Respondents characterize the Board's position as a holding that "as to any goods which petitioner—a common carrier—undertakes to carry, it has a

* Respondents repeat this concession in their brief (p. 10). In a footnote they seek to limit its effect by suggesting that only malodorous materials, dangerous commodities or commodities "unsuitable" for transportation may be excluded from the holding out. No authority is cited, however, for this proposition and the principle stated in the Board's Supplementary Report was not so limited.

duty "to serve similarly situated shippers alike' " (p. 10). This is an accurate reflection of the Board's statement that "the entity which constitutes a 'common carrier by water in foreign commerce' is subject to the provisions of the Act and the jurisdiction of this Board." (Petition, p. 25a). If this does not mean that the Board is extending the Shipping Act to all activities of a common carrier by water, it is impossible to fathom just what it does mean.

Similarly the Brief in Opposition endorses the majority below in its refusal to read the phrase "while acting as such" after the phrase "common carrier" in the Shipping Act. If the statute is not so limited it applies to all activities of a common carrier and raises the issue which petitioner has framed. It is apparent that the "very broad" issue which petitioner has stated and which respondents seek to disclaim is precisely the issue on which the Court of Appeals based its decision.

But even if respondents' "narrower" formulation of the issue is accepted, that formulation does not in fact limit or narrow the impact of the decision. Respondents state the question at issue to be whether the "anti-discrimination" provisions of the Shipping Act apply to the carriage, by a person engaged in common carriage of some commodities, of a commodity which the carrier "has not undertaken to carry" for all who "qualify" (Brief in Opposition, p. 12). Since selective offering of transportation services is an essential characteristic of contract carriage, resolution of the issue stated by respondents in their favor will bar contract carriage by a person engaged in common carriage. It is this result which will have the impact and consequences described in the Petition.

Since the decision in this case will admittedly have a wide-ranging impact on foreign and domestic shipping, it raises a question which requires resolution by this Court.

II.

The Majority Below Misconstrued the Shipping Act.

The most striking feature of respondents' attempt to defend the decision of the majority below is their failure even to mention the many cases cited in the Petition which are in conflict with that decision (Petition, pp. 15-19).

It is apparent that the approach adopted by the majority below is at war with the reasoning of this Court, of other state and federal courts, and of the Interstate Commerce Commission with respect to analogous issues arising under similar statutes. Whereas these other decisions have consistently held that regulatory statutes comparable to the Shipping Act have no application whatever to contract carrier activities, the majority below has held that the Shipping Act applies to every activity of a person engaged in common carriage, whether or not that activity constitutes common carriage. The contrast is exemplified by the ruling of the Court of Appeals for the Sixth Circuit in *United States* v. *Louisville & Nashville Railroad*, 221 F. 2d 698 (6th Cir. 1955):

> "... a common carrier acting outside the performance of its required duties to transport goods which it is not required to carry may contract as a private carrier." (221 F. 2d at 703)

This stands in direct opposition to the Board's statement in its Supplementary Report in this case that:

> "... whatever Grace—a common carrier by water—carries, it carries subject to the provisions of this Act" (Petition, p. 29a).

Respondents make some effort to weaken the force of the cases cited by petitioner by suggesting that none of those cases "involve discrimination" (p. 16).* This attempted distinction is, however, meaningless. The issue is whether any of the provisions of the Shipping Act apply to the contract carrier activities of a person also engaged in common carriage. Petitioner has cited numerous cases which hold that statutes—like the Shipping Act—which regulate common carriers have no application to contract carrier activities. Those cases are equally relevant whether the precise question involved is the setting of rates, refusal of services, or some other requirement of the regulatory statute. In all of these respects a common carrier has a

---

* Respondents also appear to suggest that petitioner has not cited cases demonstrating that a contract carrier is free at common law to choose its shippers (Brief in Opposition, p. 16). Any such suggestion is false. It is well settled that under common law principles a contract carrier may provide a specialized service for a limited number of shippers and that he may do so even if he also performs carriage of other commodities as a common carrier. For example, in *Dickson* v. *Great Northern Railway*, 18 Q. B. D. 176, 183 (C. A. 1886), Judge Lindley pointed out that:

> ". . . a company which is not a common carrier of dogs, but which may be in the habit of carrying dogs on certain terms, may at common law decline to accept any particular dog, even on those terms, and may refuse to carry the dog at all . . ."

Similarly, the basic issue in *Express Cases*, 117 U. S. 1 (1886), was whether the railroads could refuse to accommodate express companies when they had carried them only by special contract and never held themselves out as common carriers of such companies; this Court concluded that they could (see 117 U. S. at 26-27). Also, in *Lake Shore & Michigan Southern Railroad* v. *Perkins*, 25 Mich. 329 (1872), the Court upheld the refusal of a railroad to carry plaintiff's livestock on the ground that the railroad was a contract carrier, rather than a common carrier of livestock. Respondents' suggestion that the *Perkins* case concerned only the question whether a railroad could relieve itself of the standard of care imposed on common carriers (Brief in Opposition, p. 16) is inaccurate. Many cases and other authorities have pointed out that one of the essential characteristics of a contract carrier is his freedom to furnish transportation only to those with whom he wishes to deal. For example, in *Mt. Tom Motor Lines* v. *McKesson & Robbins*, 325 Mass. 45, 89 N. E. 2d 3, 5 (1949), the Supreme Judicial Court of Mass. ruled:

> ". . . a contract carrier does not furnish transportation indiscriminately but furnishes only to those with whom he sees fit to contract."

See also *Cleveland, C., C. & St. L. Ry. Co.* v. *Henry*, 170 Ind. 94, 83 N. E. 710 (1908); 1 Hutchinson, *Law of Carriers* 38 (3rd Ed. 1906); 1 *Moore on Carriers* 4 (2d Ed. 1914); Dobie, *Bailments and Carriers* 298 (1914)

duty of providing a uniform service for all who offer cargo for shipment; a contract carrier does not.

Instead of considering the cases cited by petitioner—which cannot be reconciled with the approach of the majority below—respondents cite two cases which have nothing whatever to do with the issue here. In *United States* v. *Baltimore & Ohio Railroad Co.*, 333 U. S. 169 (1948) (Brief in Opposition, p. 13), there was no contract carriage involved. There the railroad was obviously a common carrier of livestock and this Court held that it was not justified in discriminating among shippers with respect to its carriage of this commodity merely because of a contract which the carrier had made.

Similarly, in *Boynton* v. *Virginia*, 81 Sup. Ct. 182 (1960), this Court held that a common carrier of passengers in interstate commerce was barred by the Interstate Commerce Act from racial discrimination against some of those passengers in the lunchroom facilities which the carrier utilized. Petitioner does not quarrel with the proposition that the Shipping Act contains a thorough-going stricture against discrimination of any kind *in common carriage*. The question here is whether the Shipping Act can properly be applied to contract carrier activities. To this issue respondents do not address themselves.

Respondents also attempt to support the decision below by representing that the irreconcilable decisions of the Board are in fact consistent (Brief in Opposition, p. 14). A reading of the Board's decisions demonstrates that they cannot be reconciled. Thus in *Transportation by Mendez & Co.*, 2 U. S. M. C. 718 (1944), the Commission pointed out that "a carrier may be both a common and a contract carrier . . ." (2 U. S. M. C. at 721). In *Consolo* v. *Grace Line, Inc.*, 4 F. M. B. 293, 301 (1953), the Board quoted this language with approval.

The only reason for the Board's ruling adverse to petitioner in the *Consolo* Report was its erroneous view that at common law contract carriage and common carriage cannot take place on the same vessel at the same time. The decision of the Court of Appeals here did not rest on any such principle. Indeed, the Court assumed "*arguendo*" the validity of a contrary rule (Petition, p. 38a).

The Board's view in its Supplementary Report that the Shipping Act applies to a common carrier as an "entity" (Petition, p. 25a) and the adoption of that view by the Court of Appeals are directly at odds with the Board's ruling in *Mendez* and *Consolo* that "a carrier may be both a common and a contract carrier . . ."

It is significant that respondents do not even attempt to fit the Board's "susceptibility theory", asserted in its original Report in this case, into the alleged pattern of "consistency".*

Nor do respondents mention *New York Marine Co.* v. *Buffalo Barge Towing Corp.*, 2 U. S. M. C. 216 (1939), a decision directly contrary to the result here. There the Maritime Commission found that a barge line was a contract carrier unregulated by the Shipping Act even though it also engaged in common carriage under tariffs filed with the Commission. The Commission merely pointed out that the carrier's "service under tariffs is not here in issue . . ." The Commission concluded that it and other barge line

* Respondents attempt to excuse the Board's adoption of the "susceptibility" test by suggesting that petitioner "had relied almost exclusively on the argument that bananas were not as a practical matter 'susceptible' to 'common carriage' . . ." (p. 9). This is not true. Petitioner's position both before the Board and before the Examiner was consistently that its specialized carriage of bananas, not held out to the public, is contract carriage outside the scope of the Shipping Act. The bulk of petitioner's brief to the Board was devoted to this argument. Only in an argument appearing in Point IV of its brief, commencing at page 56, did petitioner argue that bananas were insusceptible of common carriage. Petitioner expressly pointed out there that the only reason why it discussed the susceptibility criterion at all was because the trial examiner had regarded it as determinative.

defendants "are not shown to be common carriers by water in interstate commerce as defined by Section 1 of the Shipping Act, 1916 . . ." (2 U. S. M. C. at 219).

Respondents also miss, or consciously evade, the point of the legislative history cited by petitioner (Petition, pp. 20-22). That legislative history very distinctly indicates that Congress contemplated that a carrier engaged in business as a common carrier, and even a vessel engaged in such business, might also engage in business as a contract carrier. Yet such a view is precisely contrary to the position adopted by the majority below.

Nor does the legislative history support respondents' statement that "tramp steamers are the only carriers, other than ferry boats, which Congress intended to exclude from the Board's jurisdiction" (Brief in Opposition, p. 16). If that were true, the insertion of the word "common" before the word "carrier" would have no effect. Indeed, the Board itself has decisively rejected the very view here expressed by respondents. *Galveston Chamber of Commerce* v. *Saguenay Terminals*, 4 F. M. B. 375, 377-78 (1954).

It is apparent that respondents' brief, like the opinion of the majority below, fails to reconcile the position taken here with the relevant decisions of this and other courts and administrative bodies, the previous rulings of the Board, and the relevant legislative history. Indeed, as Judge Moore pointed out in his dissenting opinion, the ruling of the majority below cannot even be reconciled with the prior decision of the Court of Appeals in this very case (Petition, p. 40a).

III.

The Decision of the Majority Below Constitutes a Departure from the Proper Course of Judicial Proceedings on Review of Administrative Action.

Respondents' only answer to petitioner's argument that the majority below improperly deferred to a ruling of the Board is an argument that the majority did not in fact do what it said it did.

Respondents concede that the opinion below "did indicate" that "the Board was better qualified to decide relevant issues of maritime policy" (pp. 16-17). Respondents, however, apparently take the view that this "indication" by the majority was an irrelevant comment which had nothing to do with its decision.

The lack of merit in respondents' contention is apparent in the fact that the *only authorities* relied on by the majority below in support of the position which it adopted were a quotation from the prologue of the Shipping Act defining what the majority conceived to be the Board's function (Petition, p. 38a) and a decision of the Court of Appeals for the Second Circuit which the majority cited for the proposition that the Board is "*prima facie* better qualified than are courts" to decide certain issues (Petition, p. 39a).

Certainly it must be accepted that the majority decided this case on the basis of the reasoning which it employed in its opinion. That opinion very clearly pointed out that the principal consideration which motivated the decision was the majority's desire to leave the decision of certain issues "within the power of the Board" (Petition, p. 39a). The majority did this because of its view that the Board was better qualified than the courts to decide whether par-

ticular activities of a common carrier "will prejudice the 'developing of a merchant marine' . . ." (Petition, p. 39a).

It is apparent that the majority did, in fact, defer to the ruling of the Board and that its deference was based on the Board's alleged expertise in determining what will advance and what will retard the development of a merchant marine. As the Petition has demonstrated, the Board did not in fact consider this question nor was there in the record any evidence upon which that question might be resolved (pp. 25-29). For this reason, and for the other reasons outlined in the Petition, the majority's deference to the Board was improper.

Conclusion.

The writ of certiorari should issue.

Respectfully submitted,

LAWRENCE J. MCKAY,
80 Pine Street,
New York 5, N. Y.
Attorney for Petitioner.

Of Counsel:

CAHILL, GORDON, REINDEL & OHL,
ARTHUR MERMIN,
RAYMOND L. FALLS, JR.

December 30, 1960.